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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

IOWA BEEF PROCESSORS, INC., EDWARD W. ROTHE, and LEE A. FREEMAN, SR.,

Petitioners,

vs.

LEX HAWKINS and JOHN A. COCHRANE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

EDWARD W. ROTHE
JAMES T. MALYSIAK
FREEMAN, ROTHE, FREEMAN & SALZMAN
One IBM Plaza - Suite 4735
Chicago, Illinois 60611
(312) 467-5330

Counsel for Petitioners

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NATURE OF THE CASE

Iowa Beef Processors, Inc. ("IBP") and its counsel Edward W. Rothe and Lee A. Freeman, Sr. who are named defendants in this action, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, which reversed the Southern District of Iowa's refusal to allow respondents to file a retaliatory abuse of process suit in a forum other than that whose process is alleged to have been abused. Instead, the Eighth Circuit adopted faulty compulsory counterclaim and venue tests, in conflict with other Circuits and with this Court's policy decisions, to hold that respondents' abuse claims not only may, but must be filed where each was served with the alleged abusive process and a document production request. The result, unless corrected by this Court, is that three district courts, instead of one, will be forced to consider the propriety of the IBP suit which provoked respondents' abuse claims.

OPINIONS BELOW

The panel opinion of the Court of Appeals (App. A-5-25), Judge Bright's opinion dissenting from denial of rehearing *en banc*, (App. A-27-32), and the opinion of the United States District Court for the Southern District of Iowa (App. A-1-4) are unreported.

QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in deciding, contrary to the Second and Third Circuits, that an abuse-of-process action is not a compulsory counterclaim under Federal Civil Rule 13(a) in the lawsuit alleged to constitute the abuse, but instead must be litigated independently in two other districts.

2. Whether the Eighth Circuit erred in abruptly departing from its own and other Circuits' decisions by holding that a complaint amendment, solely to cure a jurisdictional defect in a diversity case by dropping a non-diverse union and substituting diverse union officers as union class representatives under Federal Civil Rule 23.2, does not relate back under Federal Civil Rule 15(c) to the date the original complaint was filed.

3. Whether the Eighth Circuit erred in adopting a test for venue which conflicts with the Ninth Circuit's test and requires an abuse of process action to be pursued in the district in which process was merely received and not in the court whose process is allegedly being abused.

STATUTES AND RULES INVOLVED

Rule 13(a), F.R.Civ.Proc.:

> *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

Rule 15(c), F.R.Civ.Proc.:

> *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

28 U.S.C. § 1391(a):

> A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

STATEMENT OF THE CASE

On June 7, 1977, petitioner Iowa Beef Processors, Inc. filed identical diversity suits in the Northern District of Iowa (Sioux City) and the Southern District of New York against two former employees, Hughes A. Bagley and Hans Aarsen, for violating contractual and fiduciary duties by disclosing confidential IBP documents and information and against the Amalgamated Meat Cutters and Butcher Workmen of North America (an Illinois unincorporated association), Irving Stern (New York District Director of the Union), Albert J. Krieger (a New York and Miami lawyer), respondent Lex Hawkins (a Des Moines lawyer) and respondent John A. Cochrane (a St. Paul lawyer) for inducing Bagley's breaches and conspiring to defame IBP.[1]

On July 22, 1977, after obtaining an agreed extension of time to answer IBP's complaint, Hawkins and Cochrane filed suit in the Southern District of Iowa at Des Moines against IBP and its counsel, petitioners Rothe and Freeman (Illinois residents), for $24 million in actual and punitive damages, alleging that they had tortiously "invoked the judicial process" of the Sioux City and New York courts by (1) filing suit, (2) serving summons, and (3) serving a document request supposedly calling for Hawkins' and Cochrane's work product in

[1] The two identical actions were filed to insure that personal jurisdiction and venue could be obtained over all defendants in one or another of the two districts. Significant conspiratorial events occurred in both districts: Important meetings of Bagley, Krieger, and Stern took place in New York, while Bagley, Hawkins, and Cochrane held a key meeting in Sioux City. Moreover, Bagley and Aarsen both resided in the Northern District of Iowa, which is also the place where the Bagley-IBP contract in question was executed.

Meat Price Investigators Association [MPIA] *v. Iowa Beef Processors, et al.*, an antitrust suit originally filed in the Southern District of Iowa on August 10, 1976, but transferred to the Northern District of Texas at Dallas for pretrial proceedings under 28 U.S.C. § 1407 on June 7, 1977. *In re Beef Industry Antitrust Litigation*, 432 F.Supp. 211 (JPML 1977).

Also on July 22, 1977, Hawkins and Cochrane filed a motion to dismiss IBP's Sioux City case for lack of diversity, claiming (without any record support) that since the Union had members in Nebraska, IBP's principal place of business, there was no complete diversity under the theory that an unincorporated association takes the citizenship of each of its members for diversity purposes. *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965).

On August 1, 1977, before any answers had been filed in the Sioux City and New York cases, IBP filed amended complaints under Federal Civil Rule 15(a) to cure any possible jurisdictional defect by substituting the Union's three highest officers (residents of Illinois) as class representatives of the Union's members pursuant to Federal Civil Rule 23.2, in lieu of naming the Union as an entity. *There was no change in any of the other allegations of the original complaint:* The conduct described and the causes of action alleged were *identical.*

On August 2, 1977, Hawkins and Cochrane filed a motion with the Judicial Panel on Multidistrict Litigation to transfer IBP's Sioux City and New York cases to Des Moines for consolidation with their suit against IBP, requesting that all three cases be assigned to Chief Judge Hanson. This motion was denied by the Judicial Panel from the bench at oral argument on September 30, 1977 with the comment: "* * * since there are only two actions

[Sioux City and Des Moines], we will just leave them where they are."[2] (App. B-11.)

Meanwhile, on August 15, 1977, IBP, Rothe and Freeman filed a motion to dismiss the Des Moines case for lack of venue and for Hawkins' and Cochrane's failure to plead their abuse-of-process claim as a compulsory counterclaim in IBP's Sioux City and New York cases, in violation of Federal Civil Rule 13(a).

On November 17, 1977 Chief Judge Stuart granted defendants' motion to dismiss the Des Moines case for lack of venue, holding that Hawkins' and Cochrane's claims arose in the Northern District of Iowa (where "defendants are alleged to be doing that which should not be done"), which court "is in a far better position" to determine whether its process has been abused. Although Chief Judge Stuart expressed "serious reservations", he found it unnecessary to pass on defendants' alternative compulsory counterclaim argument and dismissed on the venue ground alone. (App. A-1-4.) Hawkins and Cochrane appealed the dismissal to the Eighth Circuit.

On February 13, 1978 Chief Judge McManus ruled on a number of pending motions in IBP's Sioux City case. He held, *inter alia*, that IBP's amended complaint had effectively cured any jurisdictional problem by naming as class representatives three Union officers whose state citizenship is diverse from IBP's. He also held that Hawkins' and Cochrane's work product and other objections to IBP's document production request should be overruled and ordered them to comply. (App. C-3-6, 8-9.)

[2] During oral argument, IBP's counsel informed the Judicial Panel that all but one defendant (Stern, a New York resident) had waived personal jurisdiction and venue objections in the Sioux City case. Stern's counsel then told the Judicial Panel he, too, would waive these personal objections and IBP's counsel stated that the New York action would be dismissed, which was done on October 6, 1977. (App. B-7-8, 10.)

On April 10, 1978, Hawkins and Cochrane served an answer to IBP's amended complaint in the Sioux City case, including a counterclaim identical to their complaint in the Des Moines case, in the event the Eighth Circuit affirmed Chief Judge Stuart's dismissal.

On January 5, 1979 the Eighth Circuit (Becker, Senior District Judge, writing for a panel which also included Chief Judge Gibson and Circuit Judge Henley) reversed Chief Judge Stuart's ruling as to Hawkins, but affirmed as to Cochrane, holding that the claim of each arose where IBP's summons and request for production of documents were served—Des Moines in Hawkins' case and St. Paul in Cochrane's case. In addition the Court of Appeals held that Hawkins' and Cochrane's claims were not compulsory counterclaims under Federal Civil Rule 13(a) because (1) IBP's August 1, 1977 amended complaint did not relate back to the original filing on June 7, 1977 under Federal Civil Rule 15(c), and thus, at the time IBP's Sioux City and New York cases were "lawfully commenced" on August 1, 1977, Hawkins' and Cochrane's claims were already the subject of another case pending in Des Moines (filed on July 22, 1977) within the meaning of the first exception to the compulsory counterclaim rule, and (2) Hawkins' and Cochrane's abuse-of-process claims did not arise out of the same transaction or occurrence as IBP's breach of contract and fiduciary duty, inducement, and conspiracy claims within the meaning of Rule 13(a). (App. A-5-25.)

The Eighth Circuit on March 5, 1979 denied petitioners' request for rehearing *en banc*. (App. A-26.) Judge Bright dissented from the denial because he concluded that the panel had clearly erred in requiring three courts rather than one to handle these inherently related actions and had permitted respondents' "obvious forum-shopping" tactics. (App. A-27-32.)

REASONS FOR GRANTING THE WRIT

The Eighth Circuit decision decimates the policy underlying both the federal venue statute, 28 U.S.C. § 1391(a), and Federal Civil Rule 13(a), i.e., to achieve a sensible, convenient forum for the adjudication of disputes while avoiding the duplication of judicial effort and the possibility of conflicting decisions. IBP and its counsel contend that *one* forum—the Northern District of Iowa in Sioux City—should properly and most conveniently handle all these disputes. Respondents argue that *two* courts—both the Northern District (at Sioux City) and Southern District of Iowa (at Des Moines)—are required even though the cases are causally-related and share such central factual and legal issues that conflicting decisions are possible and the Southern District would be called upon to decide whether the case being litigated before the Northern District is an abuse of process. The Eighth Circuit held, astonishingly, that not one, not two, but *three* courts must handle the cases—the Northern and Southern Districts of Iowa and the District of Minnesota.

Since the Court of Appeals decision senselessly proliferates litigation at a time when federal court resources are under intense pressure from expanding caseloads and also conflicts with decisions in other Circuits and the clear policy of the venue and compulsory counterclaim provisions, certiorari must be granted and a perverse precedent on crucial questions of judicial administration overturned.

I.

THE EIGHTH CIRCUIT COMPULSORY COUNTERCLAIM HOLDING CONFLICTS WITH SECOND AND THIRD CIRCUIT DECISIONS AND WITH RULE 13'S POLICY

Rule 13(a) "was designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters" and "was particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis for the complaint." *Southern Construction Co. v. United States*, 371 U.S. 57, 60 (1962). See also *Chicago & Northwestern Railway Co. v. Lindell*, 281 U.S. 14, 17 (1930); *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926).

To achieve the economies of having closely intertwined legal disputes litigated in one forum, the Circuits have generally followed what they conceive to be this Court's broad "logical relationship" test to determine whether a claim is so closely connected to another lawsuit to be subject to the "compulsory counterclaim" rule. See *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n. 1 (1974); *Warshawsky & Co. v. Arcata National Corp.*, 552 F.2d 1257, 1261, 1263 (7th Cir. 1977); *Columbia Plaza Corp. v. Security National Bank*, 525 F.2d 620, 625-626 (D.C. Cir. 1975); *Pipeliners Local Union No. 798 v. Ellerd*, 503 F.2d 1193, 1198-1199 (10th Cir. 1974); *Diamond v. Terminal Ry. Ala. State Docks*, 421 F.2d 228, 236 (5th Cir. 1970); *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3rd Cir. 1961).

The Eighth Circuit held here, however, that a claim that a lawsuit is in itself tortious because it allegedly is a wrongful use of process for ulterior purposes, is not logically related to that lawsuit and thus is not covered

by the compulsory counterclaim rule. This decision directly conflicts with a recent Second Circuit decision.

In *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057 (2nd Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978), the Second Circuit held that a counterclaim asserting that the main action was a part of a conspiracy to coerce the counterclaimant by threatening and pursuing baseless litigation against him, was a compulsory counterclaim under the logical relationship test. The Court of Appeals observed that the counterclaimant had asserted defenses to the main action which raised essentially the same issues as the counterclaim and that to require litigation of the defenses and counterclaim in separate courts "would amount to considerable duplication of judicial time and effort and could lead to mutually inconsistent results." *Id.*, at 1072.[3]

There is precisely the same duplication of issues here. Respondents expressly represented in their brief to the Judicial Panel on Multidistrict Litigation, when they wanted all three cases (IBP's Sioux City and New York actions and respondents' Des Moines counter-action) consolidated in their chosen forum, that all of them "arise out of an alleged breach of an employment termination contract between Iowa Beef Processors, Inc., and a former employee, Hughes A. Bagley" and that the validity of the contract is "the central issue in each of

[3] The *Newburger* Court relied on two earlier Second Circuit decisions. In *United Artists Corp. v. Masterpiece Productions, Inc.*, 221 F.2d 213, 216 (2nd Cir. 1955), the Court held a counterclaim to be compulsory which alleged that the main action was "one of a series of harassing maneuvers" designed to violate the counterclaimants' rights; the holding was necessary to avoid "circuity and multiplicity of action * * * ." Similarly, in *Lesnik v. Public Industrials Corp.*, 144 F.2d 968, 975 (2nd Cir. 1944), the counterclaim, held to be compulsory, alleged that the main action was part of a conspiracy to injure the counterclaimants.

the three suits."[4] Furthermore, respondents' complaint in this case alleges that petitioners filed IBP's action knowing that Bagley's contract violates public policy and asks for a declaratory judgment that the contract is "void as against public policy." Respondents' answer in IBP's Sioux City action similarly alleges an affirmative defense that the Bagley contract is void as against public policy. Thus, the *Newburger* reasoning applies in full force here. See also *Great Lakes Rubber Corp. v. Herbert Cooper Co., supra*, 286 F.2d at 634, a Third Circuit decision with which the Eighth Circuit's holding also conflicts.

The Eighth Circuit, however, relied solely (App. A-22-23) on the conclusory language and faulty analysis of a district court decision from a different Circuit, *Bose Corp. v. Consumers Union of the United States, Inc.*, 384 F.Supp. 600, 603 (D. Mass. 1974), which held a counterclaim alleging injury (defamation and perhaps malicious prosecution and abuse of process) arising out of the filing of the main suit and contemporaneous publicity, to be permissive rather than compulsory.

The Second Circuit has pointed out that *Bose* epitomizes a "narrow line of decisions involving counterclaims based solely on the filing of the main complaint and alleging libelous publications thereafter", which are founded on the truism that a defendant cannot be forced to plead, as a compulsory counterclaim, a cause of action that is *premature* and may never even arise. See *Harris v. Steinem*, 571 F.2d 119, 125 (2nd Cir. 1978). For this reason, a counterclaim for malicious

[4] Even the Eighth Circuit grudgingly acknowledged respondents' representation that the cases were closely linked, but then apparently held that the compulsory counterclaim rule did not apply because the claims were not *identical* (App. A-24), which has never been the law and would obliterate Rule 13(a) if widely adopted.

prosecution is treated like a counterclaim for libel arising out of the main action: Both depend on the defendant prevailing on the merits, are therefore premature, and do not meet the basic test of Rule 13(a) that to be compulsory, a counterclaim must be one which the defendant has when he files his answer. See 6 Wright & Miller, Federal Practice and Procedure: Civil § 1411, at 55-57.

Bose, and the Eighth Circuit, however, erred in treating an abuse-of-process claim in the same fashion, since abuse of process, unlike malicious prosecution, is fully mature and can be asserted immediately, provided there are legally adequate allegations that process was used for a wrongful *collateral* purpose *after* it was issued. *Simkins Ind., Inc. v. Fuld & Co.*, 392 F.Supp. 126, 129-130 (E.D. Pa. 1975). *Bose* was plainly wrong in stating (384 F.Supp. at 603) that, if Consumers Union's counterclaim alleged abuse of process, "the analysis is similar to the analysis concerning defamation." The *Bose* court provided no authority or reasoning for a patently erroneous construction of Rule 13(a), but the Eighth Circuit followed it blindly.

Therefore, a square conflict among the Circuits is presented, and the Second and Third Circuits' holdings must prevail. The Eighth Circuit decision cannot be justified by any policy consideration, but it plainly trebles both the burden on the courts generated by respondents' abuse-of-process claims and also the risk of conflicting decisions.

II.

THE EIGHTH CIRCUIT RELATION BACK HOLDING CONFLICTS WITH ITS OWN PRIOR DECISIONS AND OTHER CIRCUITS

An alternative ground for the Eighth Circuit's refusal to apply the compulsory counterclaim rule was its holding that IBP's August 1, 1977 amended complaint did not "relate back" under Federal Civil Rule 15(c) to June 7, 1977 when the suit was filed, and thus when respondents' abuse-of-process action was filed in the interim on July 22, 1977 there was purportedly no "pending" suit in which it could have been pled as a compulsory counterclaim. (App. A-24-25.)

This is pure sophistry and was exposed as such by Judge Bright's opinion dissenting from the Eighth Circuit's order denying rehearing *en banc*:

> I am troubled * * * by the panel's alternative ruling on the compulsory counterclaim issue. The panel determined that the appellants' abuse of process actions were filed prior to the effective date of IBP's complaint in the Northern District of Iowa and therefore could not be compulsory counterclaims in IBP's action, under Fed. R. Civ. P. 13(a). *See* panel slip op. at 22-23. In so ruling, the panel concluded that, for purposes of Rule 13(a), IBP's amended complaint in the Northern District altered to perfect diversity jurisdiction, does not relate back to the date of IBP's original complaint. *Such a restrictive reading of the relation back rule of Fed. R. Civ. P. 15(c) lacks support in the language of the rule, in case law, or in policy.* Although I have found no case considering this question in the context of Rule 13(a), *prior decisions of this and other courts have indicated, without exception, that a complaint amended by dropping nonessential parties to perfect diversity jurisdiction relates back to the date of the original pleading. E.g., Finn v. American Fire & Casualty Co.*, 207 F.2d 113, 116 (5th Cir. 1953);

Brown v. Texas and Pacific R.R. Co., 392 F.Supp. 1120, 1124 (W.D.La. 1975). *See International Ladies Garment Workers' Union v. Donnelly Garment Co.*, 121 F.2d 561, 563 (8th Cir. 1941) (dictum); 3A *Moore's Federal Practice* ¶21.03[2] (1978). *Cf. Interstate Refineries Co. v. Barry*, 7 F.2d 548, 550 (8th Cir. 1925) (in accord with relation back rule, but pre-Federal Rules). [App. A-32 n. 5; emphasis added.]

The Eighth Circuit opinion did not even mention these diametrically opposed precedents, and the only authorities cited in support of the Court's convoluted logic (App. A-25) are completely inapposite: *Hale v. Ralston Purina Co.*, 432 F.2d 156, 159 (8th Cir. 1970), did not involve the relation back of an amendment to cure a defect in diversity jurisdiction, but rather an attempt to introduce *an entirely new claim;* and Moore's discussion of this subject in fact directly contradicts the Eighth Circuit's holding (3 Moore's Federal Practice ¶¶15.09, 15.15 at 15-206).

No explanation has been given nor can any justification be found for the Eighth Circuit's willingness to defy precedent and logic and to create an intercircuit conflict on Rule 15(c) just to guarantee that these interlocked disputes be litigated simultaneously in three courts rather than one.

III.

VENUE LIES IN THE COURT WHOSE PROCESS WAS ALLEGEDLY ABUSED

The Eighth Circuit's construction and application of the federal venue statute for diversity cases, 28 U.S.C. § 1391(a), is as bizarre as its interpretation of Rules 13(a) and 15(c). It held that proper venue was in each of respondents' home districts (Southern District of Iowa for Hawkins, District of Minnesota for Cochrane) solely

because each received process and IBP's production request there. The District Court, in sharp contrast, had ruled that respondents' cause of action "arose" in the Northern District of Iowa where IBP's suit was filed since "[i]t is there, by filing an action against Hawkins and Cochrane, that defendants are alleged to be doing that which should not be done."[5] (App. A-3.)

To reach its desired result, the Eighth Circuit appears to have used as the test for *venue* the "minimum contacts" standard developed by this Court to decide whether *jurisdiction* in a State can be exercised over a nonresident.[6] See *International Shoe Co. v. State of*

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[5] Section 1391(a) provides for venue where all the defendants or all the plaintiffs reside or where the cause of action arose. Since petitioners Rothe and Freeman reside in Illinois and plaintiff Cochrane in Minnesota, only the "where the action arose" test is applicable here.

The venue provision for federal-question cases also includes the "where the action arose" rule. See 28 U.S.C. § 1391(b). This Court recently noted probable jurisdiction of an appeal involving the construction of the "where the action arose" provision of § 1391(b). *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1273-1274 (5th Cir. 1978), *prob. jur. noted*, No. 78-759 (Jan. 8, 1979). The present petition thus presents the Court with the opportunity to provide venue guidelines simultaneously for diversity and federal-question cases.

[6] The Eighth Circuit purported to base its venue decision on *Gardner Engineering Corp. v. Page Engineering Co.*, 484 F.2d 27 (8th Cir. 1973), which decided both personal jurisdiction (30-32) and venue (32-33) questions. The decision below, however, relied primarily (App. A-16, 18, 19) on the *jurisdictional* portion of *Gardner*, which in turn was based on Mr. Justice (then Judge) Blackmun's opinion in *Aftanase v. Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965). Paradoxically, the *Gardner* Court took pains to distinguish jurisdictional analysis from venue analysis. Discussing jurisdiction, the Court noted that the plaintiff was *not* required "to choose the forum with the most significant contacts * * *" since the "minimum contacts" rule was applicable (484 F.2d at 31), but on venue it used the same "significant contacts" test employed by the Ninth Circuit in the *Commercial Lighting Products, Inc.* case discussed *infra* in the text. While the Eighth Circuit in this case stated that it was using a "weight of contacts" approach to

(Footnote continued on following page)

Washington, 326 U.S. 310 (1945), and its progeny. This test departs dramatically from the "significant contacts" test applied for diversity-case venue by the Ninth Circuit: "any district in which *a substantial part* of the acts, events, or omissions occurred that gave rise to the claim for relief." *Commercial Lighting Products, Inc. v. United States District Court*, 537 F.2d 1078, 1080 (9th Cir. 1976) (emphasis added). The Ninth Circuit, moreover, expressly refused to hold that venue was coextensive with a State's jurisdictional long-arm statute. *Id.*, at 1079-1080.

The conflict between the Eighth and Ninth Circuits on the proper test for venue is not academic since under the facts here the Ninth Circuit test would have required a different result. While there is authority arguably supporting *jurisdiction* over a nonresident on the basis of the resident plaintiff's receipt of a communication in the forum State,[7] there is no procedent for basing federal venue on such a flimsy foundation.[8] The mere receipt of

[6] *continued*
venue, its reliance on the jurisdictional portion of *Gardner*, its mode of analysis, and its result on these facts indicate that either it viewed the "minimum contacts" test and the "weight of contacts" method as equivalent or instead was hopelessly confused about the distinction between jurisdiction and venue.

Judge Bright's opinion dissenting from the denial of rehearing *en banc* pointed out the improper use of the "minimum contacts" test for venue (App. A-29-30 n. 4), but obviously to no avail.

[7] *Norton v. Local Loan*, 251 N.W.2d 520 (Iowa 1977) (allegedly fraudulent telephone call from non-resident to resident satisfied due process requirements for personal jurisdiction).

[8] See, e.g., *Weil v. New York State Dept. of Transportation*, 400 F.Supp. 1364, 1465 (S.D.N.Y. 1975) (receipt of notice of employment termination insufficient for venue where significant acts allegedly violating plaintiff's employment rights occurred in different district); *Kipperman v. McCone*, 422 F.Supp. 860, 877-879 (N.D. Cal. 1976) (learning of and experiencing emotional distress from allegedly illegal acts insufficient for venue where substantial activities underlying cause of action occurred in different district).

process and a production request was simply not a substantial part of the wrong alleged, which was that IBP, represented by Rothe and Freeman, had improperly "invoked the judicial process" of the Sioux City court. (Respondents' Complaint ¶15.) Judge Bright, dissenting below from the denial of rehearing *en banc*, explained why venue for all three cases should be in the Northern District of Iowa:

> Appellant Hawkins' abuse of process claim against the appellees is identical in substance to the claim of appellant Cochrane, and the disposition of each of those claims will require identical factual inquiries concerning the appellees' motivation in filing IBP's action, alleged to be abusive of process, in the Northern District of Iowa. Moreover, it seems that the single forum which may most conveniently undertake such factual inquiries is the district in which the appellees filed their lawsuit, the Northern District of Iowa. Yet, according to the panel opinion, the substantially identical claims of Hawkins and Cochrane must be tried in two different forums: respectively, the Southern District of Iowa and the District of Minnesota.
>
> That result is obviously impractical and potentially wasteful of judicial and legal time and resources, and I suggest that the panel's reasoning is unsound.
>
> * * *
>
> Surely, the convenience of the parties and the courts is best served by litigation of Iowa Beef's conspiracy action and of Hawkins' and Cochrane's peripheral abuse of process actions in a single forum, which can only be accomplished in the Northern District of Iowa. Instead, the panel itself has "proliferat[ed] this growing mass of litigation," by scattering these related actions to three separate forums. [App. A-28-30; footnotes omitted.]

The Eighth Circuit's decision is particularly anomalous since it was done supposedly for the "aggrieved party's" convenience, but it denied Cochrane his

choice of Des Moines as a forum and told him Minnesota would actually be more convenient,[9] and also ignored the fact that the parties were already litigating a closely connected case in Sioux City and that no one's convenience could be furthered by the waste and expense of triplicate litigation of the same essential issues. Instead, the Court of Appeals sustained respondents' "obvious forum-shopping" tactics which, in Judge Bright's words, "needlessly complicate the disposition of federal litigation * * *" and which should "receive short shrift."[10] (App. A-31.)

It is now up to this Court to resolve the conflicts created below and to instruct the lower federal courts not to make senseless venue decisions which only compound the mass of litigation now confronting them. All considerations here point to one logical forum—the Northern District of Iowa whose process is allegedly being abused. Cf. *Barrett v. Baylor*, 457 F.2d 119, 123 n. 1 (7th Cir. 1972).

[9] Hawkins and Cochrane filed a joint complaint, but petitioners did not move to sever the causes of action because the criteria for joining parties under Rule 20, F.R.Civ.Proc., were plainly met. However, the Court of Appeals necessarily has ordered the severance of the causes of action on its own motion to compel respondents' to pursue their individual actions in different districts.

[10] The Eighth Circuit's result also sharply conflicts with the Judicial Panel's handling of the question of the proper forum for these disputes. The Panel denied consolidation of the Sioux City and Des Moines cases because those two courts had available procedural tools (venue and compulsory counterclaim) to work out their own consolidation. (App. B-1-11.) However, the Eighth Circuit interfered and did not allow the district courts to solve the problem.

CONCLUSION

The Court of Appeals had to decide three legal questions (compulsory counterclaim, relation back, venue) in determining where these disputes were to be litigated. It erred in deciding each one, and created a conflict among the Circuits on each point. The paradox is that the Eighth Circuit had to labor strenuously to produce this anomaly since the authorities and policy considerations are all to the contrary. Because it proliferates essentially one controversy between the same parties into three different courts, the decision below now compels an exercise of this Court's certiorari jurisdiction to eliminate the resulting procedural nightmare.

Accordingly, petitioners ask the Court to grant a writ of certiorari to the Eighth Circuit and to reverse that Court's decision that one controversy must be litigated simultaneously in three different federal courts.

Respectfully submitted,

EDWARD W. ROTHE
JAMES T. MALYSIAK
FREEMAN, ROTHE, FREEMAN & SALZMAN
One IBM Plaza - Suite 4735
Chicago, Illinois 60611
(312) 467-5330

Counsel for Petitioners

APPENDIX A

In the United States District Court
Southern District of Iowa
Central Division

Civil No. 77-219-2.

Lex Hawkins and John A. Cochrane,

Plaintiffs,

v.

Iowa Beef Processors, Inc., et al.,

Defendants.

ORDER

(Filed in U.S. District Court November 17, 1977)

The Court has before it defendant's motion to dismiss the above entitled action for improper venue and failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(3), 12(b)(6). For the purpose of providing necessary background for its ruling herein, the Court first reviews the procedural context from which defendants' motion arose.

On June 7, 1977, Iowa Beef Processors, Inc., defendant in the present action, filed as plaintiff a separate action in the United States District Court for the Northern District of Iowa (Iowa Beef Processors, Inc. v. Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, Hawkins, Cochrane, et al.). This Northern District action, which was based in part upon information gained during a hearing in this Court in still another case (Iowa Meat Price Investigators, et al.

v. Iowa Beef Processors, et al.), alleged that Hawkins, Cochrane, and others induced former Iowa Beef Processors (IBP) officials to breach their contracts with IBP. Thereafter, on July 22, 1977, Hawkins and Cochrane responded with the present action against IBP and its counsel, alleging abuse of process. Plaintiffs Hawkins and Cochrane claim that IBP's case in the Northern District, and a companion case filed in the Southern District of New York, invoked these courts' judicial processes in an attempt to interfere, by way of intimidation and harassment, with this Court's Iowa Meat Price Investigators case. A subsequent attempt by plaintiffs Hawkins and Cochrane to have the cases in the Northern District of Iowa, the Southern District of New York, and the present case transferred to this Court for pretrial proceedings, pursuant to 28 U.S.C. & (sic) 1407, was unsuccessful.[6] See In re Iowa Beef Processors Employment Termination Contract Litigation, Docket No. 315 (Judicial Panel on Multidistrict Litigation, October 5, 1977).[1]

Defendants, in their motion to dismiss the pending "abuse of process" action, contend that venue under 28 U.S.C. § 1391(a) is improper.[2] Clearly, as defendants argue, the divergence in citizenship among plaintiffs and among defendants necessarily makes proper venue in this case turn on where "the claim arose". The issue before this Court is whether defendants are correct in

[1] The Court has received a letter from counsel for IBP indicating that the New York action, on plaintiff's own motion, was dismissed on October 6, 1977.

[2] Section 1391(a) provides:

> "A civil action wherein jurisdiction if founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, on (sic) in which the claim arose."

claiming that plaintiffs' action for abuse of process arose in the Northern District of Iowa, thereby making venue improper in this district.

With convenience to the parties foremost in mind, federal courts have recently applied a "minimum contacts" approach when determining where a "claim arose." Travis v. Anthes Imperial Ltd., 473 F. 2d 515 (8th Cir. 1973); 1 Moore's Federal Practice, § 0.142[.5-2]. These courts look to the operative facts of a case to ascertain the most significant contacts. Arnold v. Smith Motor Co., Brookfield, Mo., 389 F. Supp. 1020 (N.D. Iowa 1974). Though considered less significant in other types of actions, the place of injury remains as the principal operative fact in simple tort cases. Redmond v. Atlantic Coast Football League, 359 F. Supp. 666 (S.D. Ind. 1973); Maney v. Ratcliff, 399 F. Supp. 760 (E.D. Wis. 1975). This is especially true in the action, in which the Multidistrict Panel has apparently concluded that no other factor makes one district more convenient to the parties than another.

In the present action, the Court finds the place of injury to be in the Northern District of Iowa. It is there, by filing an action against Hawkins and Cochrane, that defendants are alleged to be doing that which should not be done. While the injury may have effects in this district, the overt act giving rise to the injury was the filing of an action in the federal court for the Northern District of Iowa.

To prove "abuse of process", plaintiffs must show that defendants seek to pervert the use of judicial process in the Northern District, and do so for an ulterior motive. Sarvold v. Dodson, 237 N.W. 2d 447 (Iowa 1976). The Northern District Court is in a far better position to make such a determination. Though perhaps propelled

by facts uncovered in an action elsewhere, defendants' action in the Northern District, based upon inducement to breach contract, is entirely different from the action allegedly interfered with in this Court, which focuses on antitrust violations. This Court should not attempt to tell the Northern District Court that a case pending on its docket was abusing its processes and was but a facade, much less—as plaintiffs request—enjoin the Northern District Court from processing that case. Also, if the Northern District proceeds on both actions, the possibility that rulings of this Court and the United States District Court for the Northern District would come into direct conflict is eliminated.

This Court, while noting its serious reservations, need not consider defendants' argument that plaintiffs' present case must be dismissed because it is a compulsory counterclaim to defendants' case in the Northern District. Having determined that the venue is improperly laid, the Court dismisses the action on this ground alone. 28 U.S.C. § 1406(a).

It Is Hereby Ordered that the above-entitled action be dismissed for lack of proper venue.

Signed this 17 day of November, 1977.

/s/ W. C. STUART
W. C. STUART, Chief Judge
Southern District of Iowa

11-17-77 Copy to attys.: Judges Hanson, Stuart & McManus 58-0J-86

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 77-1988
John A. Cochrane,

Appellant,

v.

Iowa Beef Processors, Inc., Edward W. Rothe and Lee Freeman, Sr.,

Appellees.

No. 78-1008
Lex Hawkins,

Appellant,

v.

Iowa Beef Processors, Inc., Edward W. Rothe and Lee Freeman, Sr.,

Appellees.

Appeals from the United States District Court for the Southern District of Iowa.

Submitted: May 18, 1978
Filed: January 5, 1979
(as corrected January 12, 1979)

Before GIBSON, *Chief Judge*, HENLEY, *Circuit Judge*, and BECKER, *Senior District Judge.**

BECKER, *Senior District Judge.*

* The Honorable William H. Becker, United States Senior District Judge, Western District of Missouri, sitting by designation.

These consolidated appeals are from a final judgment of the United States District Court for the Southern District of Iowa[1] granting a defense motion to dismiss for improper venue[2] this diversity case which sounds in common law tort for alleged abuse of process cognizable under Iowa law, and generally under § 682 of the Restatement of Torts.

The plaintiffs (appellants) in the case are Lex Hawkins and John A. Cochrane, both of whom are practicing attorneys. Mr. Hawkins is a citizen of Iowa and resides in Des Moines, in the Southern District of Iowa. Mr. Cochrane is a citizen of Minnesota, resides in and practices in the City of St. Paul, and elsewhere, including the Southern District of Iowa.

The defendants in the case are two individuals and one corporation. The individual defendants, Edward W. Rothe and Lee Freeman, Sr., are citizens of Illinois. Like the plaintiffs, they are lawyers and practice in Chicago and elsewhere, including the Southern District of Iowa. One of their clients is the corporate defendant, Iowa Beef Processors, Inc. (Iowa Beef), which is a Delaware corporation having its principal place of business in Nebraska.

The suit arises from the fact that in early June 1977, Iowa Beef filed two suits in federal courts in the Northern District of Iowa and the Southern District of New York, against a number of defendants, including Mr. Cochrane and Mr. Hawkins.[3] Both complaints filed

[1] The Honorable William C. Stuart, Chief Judge.

[2] 28 U.S.C. § 1406(a).

[3] That case is docketed as No. C-77-4040 and is on the docket of Chief Judge McManus. The initial complaint in that case named as defendants, in addition to Cochrane and Hawkins,

(Footnote continued on following page)

by Iowa Beef charged that in early 1977 the defendants, including Hawkins and Cochrane, conspired to obtain from the defendant Hughes A. Bagley, a former officer of Iowa Beef, and from the defendant Hans Aarsen, a former employee of Iowa Beef, confidential information about Iowa Beef's operation and confidential documents; that disclosure of these documents would be damaging to Iowa Beef and would be helpful to Messrs. Cochrane and Hawkins in an antitrust action that they were prosecuting in the Southern District of Iowa on behalf of an organization known as Meat Price Investigators Association (MPIA) in which Iowa Beef and other corporations were defendants; that the disclosures by Bagley violated not only his fiduciary duties to Iowa Beef but also the terms of a contract that had been entered into between him and Iowa Beef in connection with Bagley's separation from his employment by Iowa Beef; and that the disclosures by Aarsen violated his fiduciary duties to his former employer. In these actions Iowa Beef sought damages, declaratory and injunctive relief.

At or about the same time that it filed its suit in the Northern District of Iowa, Iowa Beef filed a similar suit against the same defendants in the United States District Court for the Southern District of New York. That suit was later dismissed by Iowa Beef after jurisdictional and venue questions were raised.

[3] *continued*
the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Irving Stern, Albert J. Krieger, Hughes A. Bagley and Hans Aarsen. On August 1, 1977 the complaint was amended so as to eliminate the Union as a defendant and to substitute for it three representatives of the Union as class defendants to avoid jurisdictional problems, caused by joinder of the Union.

The plaintiff Hawkins contends that summons and discovery motions to produce documents in both of these actions were unlawfully served on him in the Southern District of Iowa causing injury to him in the Southern District of Iowa, where most of the documents were located in the office of MPIA.

The plaintiff Cochrane contends that summons and discovery motions to produce documents in both of these actions were unlawfully served on him in Minnesota causing injury to him in both Minnesota and in the Southern District of Iowa because most of the documents he was requested to produce were held in the Southern District of Iowa in connection with the related antitrust action he and Hawkins were prosecuting in the Southern District of Iowa.

While both of those suits were pending, Iowa Beef served on the plaintiffs motions to produce documents that were in the possession of the plaintiffs. While the motions requested that the documents be produced both at the office of Iowa Beef's counsel in Sioux City, Iowa and at the office of Iowa Beef's counsel in New York City, plaintiffs contend the principal injuries to both occurred in the Southern District of Iowa where most of the documents were located, and where Hawkins was served with the allegedly unlawful process.

The theory of the plaintiffs in this case is that while the filing of the suits in the Northern District of Iowa and the Southern District of New York by Iowa Beef were improperly motivated, the service of process therein, including summons and motions to produce, constituted abuse of process and tortious interference with prospective advantage. Plaintiffs contend the abuse of process injured both in the Southern District of Iowa,

and injured Cochrane to a lesser degree in Minnesota. Plaintiffs claimed actual and punitive damages amounting to $24,000,000.00 and sought injunctive and declaratory relief as well. They also asked for interest, costs, and a reasonable attorney's fee.

From what has been said, it is clear that the district court had diversity jurisdiction of the case. The problem is simply one of venue. Since jurisdiction is based solely on diversity of citizenship, the resolution of the question of venue is governed by 28 U.S.C. § 1391(a). That section provides, subject to exceptions not here relevant, that where a suit is filed in federal court on the basis of diversity of citizenship alone it must be filed either in the district where all plaintiffs reside, or in the district where all defendants reside, or in the district in which "the claim arose."

In view of the citizenship of the parties which has been described, it is evident that venue in the Southern District of Iowa was proper only if plaintiffs' claim "arose" in that district within the meaning of § 1391(a).

Apart from the venue question with which we are concerned, this case would not appear to be a particularly complicated one. However, it is an offshoot of extensive antitrust litigation involving the beef industry in this country. A number of suits have been filed under § 4 of the Clayton Act, 15 U.S.C. § 15, charging violations of §§ 1 and 2 of the Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1 and 2. One of those suits was filed by Messrs. Hawkins and Cochrane on behalf of MPIA, which has been mentioned, against several defendants, including Iowa Beef, represented by Messrs. Rothe and Freeman, and another defendant identified as Spencer

Foods, Inc.[4] The filing of that suit and events leading up to it have unfortunately created much animosity which has extended to at least some of the lawyers involved in the litigation.[5]

One may suspect that the suits filed by Iowa Beef in the Northern District of Iowa on June 7, 1977, and in the Southern District of New York at about the same time were in retaliation for the filing by Hawkins and Cochrane of the MPIA suit, and designed to provide two new opportunities to make discovery from the clients of appellants; and that the filing of these instant actions on July 22, 1977 by Hawkins and Cochrane against Iowa Beef and its attorneys was in retaliation for the filing of the actions in the Northern District of Iowa and in the Southern District of New York.

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[4] The suits were filed in federal court in California, Iowa, Nevada, Texas and Utah. The Judicial Panel on Multidistrict Litigation, established by 28 U.S.C. § 1407, consolidated all of the cases, including the MPIA suit, for pretrial purposes and concentrated them in the United States District Court for the Northern District of Texas. *See In re Beef Industry Antitrust Litigation*, 419 F.Supp. 720 (JPML 1976), and 432 F.Supp. 211 (JPML 1977).

[5] There seems to be no question that Mr. Hawkins and Mr. Cochrane had some private conversations with Hughes A. Bagley, who has been mentioned and who at the time of the conversations was employed by Spencer Foods, and that he may have given Hawkins and Cochrane information that was damaging not only to Iowa Beef but also to Spencer Foods. In any event, when Spencer Foods was sued along with Iowa Beef and other defendants, it moved unsuccessfully for a severance of the claim against it from the claims against the other defendants, and for an order disqualifying Hawkins and Cochrane from further representation of MPIA against Spencer Foods on the gound that they had been guilty of unethical conduct. *See Meat Price Investigators Association v. Spencer Foods, Inc.*, (C.A. 8 1978) 572 F.2d 163; *Iowa Beef Processors, Inc. v. Bagley*, (C.A. 8 1978) ..... F.2d ..... , No. 78-1855, December 14, 1978. This latter claim is mentioned in the complaint of appellants.

The appellants and other defendants in the action in the Northern District of Iowa case filed a number of defensive motions that were not acted upon until February 1978. In the meantime, appellants Cochrane and Hawkins were not compelled to produce any of the material that Iowa Beef had sought to require them to produce in Chicago and New York.

We now return to the point at issue, which is whether the district court erred in holding that the claims of appellants did not arise in the Southern District of Iowa, and so did not satisfy the applicable venue requirement of § 1391(a).

The district court dealt with the problem in the following language:

> With convenience to the parties foremost in mind, federal courts have recently applied a 'minimum contacts' approach when determining where a 'claim arose'. *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515 (8th Cir. 1973); 1 Moore's Federal Practice, § 0.142[.5-2]. These courts look to the operative facts of a case to ascertain the most significant contacts. *Arnold v. Smith Motor Co., Brookfield, Mo.*, 389 F.Supp. 1020 (N.D. Iowa 1974). Though considered less significant in other types of actions, the place of injury remains as the principal operative fact in simple tort cases. *Redmond v. Atlantic Coast Football League*, 359 F.Supp. 666 (S.D. Ind. 1973); *Maney v. Ratcliff*, 399 F.Supp. 760 (E.D. Wis. 1975). This is especially true in this action, in which the Multidistrict Panel has apparently concluded that no other factor makes one district more convenient to the parties than another.
>
> In the present action, the Court finds the place of injury to be in the Northern District of Iowa. It is there, by filing an action against Hawkins and Cochrane, that defendants are alleged to be doing that which should not be done. While the injury

may have effects in this district, the overt act giving rise to the injury was the filing of an action in the federal court for the Northern District of Iowa.

To prove 'abuse of process', plaintiffs must show that defendants seek to pervert the use of judicial process in the Northern District, and do so for an ulterior motive. *Sarvold v. Dodson*, 237 N.W.2d 447 (Iowa 1976). The Northern District Court is in a far better position to make such a determination. Though perhaps propelled by facts uncovered in an action elsewhere, defendants' action in the Northern District, based upon inducement to breach contract, is entirely different from the action allegedly interfered with in this Court, which focuses on antitrust violations. This Court should not attempt to tell the Northern District Court that a case pending on its docket was abusing its processes and was but a facade, much less—as plaintiffs request—enjoin the Northern District Court from processing that case. Also, if the Northern District proceeds on both actions, the possibility that rulings of this Court and the United States District Court for the Northern District would come into direct conflict is eliminated.

This Court, while noting its serious reservations, need not consider defendants' argument that plaintiffs' present case must be dismissed because it is a compulsory counterclaim to defendants' case in the Northern District. Having determined that the venue is improperly laid, the Court dismisses the action on this ground alone. 28 U.S.C. § 1406(a).

It Is Hereby Ordered that the above-entitled action be dismissed for lack of proper venue.

Appellants seek reversal of this judgment of the district court dismissing the action because of lack of venue.

Issues Presented On Appeal

In support of its assignment of error on appeal, appellants contend that:

A. In simple tort cases for (1) abuse of process and (2) tortious interference with prospective advantage, cognizable under Iowa law, venue is proper in the place of harm or injury, which was in the Southern District of Iowa. For this reason federal case law supports diversity action venue where the process is received.

B. Application of the "weight of contacts" approach requires a finding that venue was proper in the Southern District of Iowa.

C. Where there are no compelling justifications for venue in another district the trial court erred in not allowing plaintiffs their choice of forum, the Southern District of Iowa.

Anticipating the need to secure favorable resolution of the compulsory counterclaim issue, appellants further contend:

D. The plaintiffs' action was not a compulsory counterclaim in either the Northern District of Iowa or in the action in the Southern District of New York.

Appellees oppose each of appellants' contentions.

For the reasons stated hereinafter, we conclude that within the meaning of § 1391(a) that (1) the claim of appellant Hawkins arose in the Southern District of Iowa, and reverse that part of the judgment of the district court dismissing the claim for relief of the appellant Hawkins; (2) the claim of appellant Cochrane arose in the District of Minnesota, and affirm that part of the judgment dismissing the claim for relief of appellant Cochrane, and remand the action to the district court for the Southern District of Iowa for further proceedings consistent with this opinion.

I.

Nature of Appellants' Claim for Relief

In this diversity action appellants base their claims for relief upon the law of Iowa, and to recover each must establish his claim under the law of Iowa.

In support of their claims for relief, appellants rely upon general tort law, citing, among other authorities: Prosser, *Law of Torts*, § 121 (4th edition 1971); 3 *Restatement of Torts 2d*, § 682 on Abuse of Process; Note, *Abuse of Process*, 13 Cleveland-Marshall L.Rev. 163 (1964).

Appellants cite an Iowa decision supporting their contention that a claim for relief for abuse of process exists under Iowa law, citing *Sarvold v. Dodson*, 237 N.W.2d 447 (Iowa 1976) applying § 682 of the *Restatement of Torts* (1938). Further, appellants cite an Iowa decision supporting their contention that a claim for relief for tortious interference with prospective advantage exists under Iowa law. *Stoller Fisheries, Inc. v. American Title Insurance Co.*, 258 N.W.2d 336 (Iowa 1977). The *Stoller* case follows § 766B of Tentative Draft No. 23 (1977) of the *Restatement of Torts*.[6]

Significantly, appellants rely on the *Sarvold* decision, *supra*, which quotes with approval the leading federal district court opinion in *Hyde Construction Co., Inc. v. Koehring Co.*, (S.D. Miss. 1974) 387 F.Supp. 702, 1.c. 712, *affirmed in the material part*, (C.A. 5 1977) 546 F.2d

[6] The *Stoller* case, *supra*, construes § 766B of Tentative Draft No. 23 to require as an element of the claim for relief that the interference cause the third party to discontinue the contractual relation of appellants with their client, or their successful prosecution of the antitrust action of *MPIA v. Iowa Beef*. Neither result is alleged. Therefore, the second claim for relief of appellants may be construed under Iowa law to state a claim for abuse of process only.

1193. This latter case, at the district court level, held that process issued by courts in Oklahoma and Wisconsin but served in Mississippi supported a claim for relief under Mississippi law cognizable in Mississippi courts, and dealt with the "significant contacts" rule and the "center of gravity" rule.

The better rule is that the ultimate determination in diversity cases of the district in which the claim arose requires application of federal procedural law construing § 1391, Title 28 U.S.C. 15 Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3803, page 10 and cases cited in note 10. But state substantive law applies in defining the essential elements and nature of the claim for relief asserted under state law. Appellants have demonstrated the existence under Iowa law of actions for abuse of process. Whether appellants' second claim for relief based on alleged tortious interference with prospective advantage exists under Iowa law is less clear because the *Stoller* case dealt with intentional interference with prospective *contractual* relation. A decision on that question need not be made on this appeal, and can be left to the judgment of the district court on remand. The same acts of appellees alleged in paragraph 15 of the complaint (Appendix 6, 7), are relied on by appellants in support of their second claim for relief. Therefore, the conclusions of this opinion concerning the district in which each claim for relief of appellants arose are applicable to the claims for tortious interference with prospective advantage.

A discussion of the federal procedural law construing § 1391(a), Title 28 U.S.C. applicable to this appeal follows.

II

The Applicable Federal Procedural Law

The federal courts have developed varying standards for determining where the claim arose. The principal ones are (1) the "weight of contacts" rule; (2) the "place of injury" rule; (3) the American Law Institute rule, derived from the ALI Study of the Division of Jurisdiction Between the State and Federal Courts, § 1303, 1314 (1969). These, and other standards without general support, are described in Wood, *Federal Venue: Locating the Place Where the Claim Arose*, 54 Texas L.Rev. 392.

This court has noted the American Law Institute rule, in considering the analysis of five factors by Judge Blackmun (Mr. Justice Blackmun) in *Aftanase v. Economy Baler Co.*, (C.A. 8 1965) 343 F.2d 187, and concluded that:

> "Since venue is a procedural rule of convenience, the convenience of the aggrieved party should be first accommodated." *Gardner Engineering Corporation v. Page Engineering Company*, (C.A. 8 1973) 484 F.2d 27, 1.c. 33.

The American Law Institute rule allows venue in any district in which "a substantial part of the events or omissions giving rise to the claim occurred." 15 Wright Miller & Cooper, *Federal Practice and Procedure*, § 3806, page 29, citing with approval *Gardner Engineering Corporation v. Page Engineering Company, supra*, (C.A. 8 1973) 484 F.2d 27.

The principles of the *Gardner Engineering Company* case, *supra*, should be applied in this appeal separately to the claim for relief of appellant Hawkins, and to the claim for relief of appellant Cochrane.

III

Where the Claim of Hawkins Arose

On June 7, 1977 the defendant, Iowa Beef Processors, acting through its counsel defendants Rothe and Freeman, filed in the Northern District of Iowa and the Southern District of New York, identical diversity civil actions against Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO (Union), Irving Stern, Albert J. Krieger, Lex Hawkins, John A. Cochrane, Hughes A. Bagley and Hans Aarsen. The civil actions were based on alleged conduct by the defendants in causing and inducing one Bagley, as former employee of the plaintiff, to violate a contract by giving confidential information to the defendants in those actions. As noted above, the elements of the claim of Hawkins for relief for abuse of process were based on the service upon him in the Southern District of Iowa of summons and motions to produce in Chicago and New York documents located in the Southern District of Iowa (Appellants' Brief 5-11). The alleged abusive process was issued contemporaneously by the district courts of the Northern District of Iowa and the Southern District of New York. Appellants claim that, under Iowa law, the claims arose when the abusive process was served and each sustained injury, citing *Stoller Fisheries, Inc. v. American Title Insurance Company, supra*, 258 N.W.2d 336 (Iowa 1977) and *Wolfswinkel v. Gesink*, 180 N.W.2d 452 (Iowa 1970) (Appellants' Brief, 18, 19) for the rule of substantive law that the claim arose only when injury was caused.

In these circumstances it is clear that under any of the federal procedural standards mentioned above the claim of Hawkins arose in the Southern District of Iowa.

The controlling opinion of this court in the *Gardner Engineering Corporation* case, *supra*, requires a reversal of the dismissal of the claim for relief of Hawkins, because all three primary factors described by Mr. Justice Blackmun at page 31 of 484 F.2d are related only to the Southern District of Iowa.[7] All contacts giving rise to the claim for relief occurred in the Southern District of Iowa. The remaining two secondary factors, interest of the forum state (district here) and convenience point to venue in the Southern District of Iowa. For if the claim related to the process issued in the Northern District of Iowa arose in the Northern District of Iowa, then a separate second claim arose in the Southern District of New York. This assumption would require the appellants to travel to New York to seek satisfaction of their claims further proliferating this growing mass of litigation. Such a result would violate the rule of the *Gardner Engineering* case, *supra*, that the convenience of the aggrieved party should be first accommodated.

All alleged acts claimed by Hawkins to constitute tortious interference with prospective advantage occurred in the Southern District of Iowa.

Under the "weight of contacts" rule and the American Law Institute rule, it follows for all of the same reasons that the claim of appellant Hawkins arose in the Southern District of Iowa. So that portion of the judgment dismissing the complaint of appellant Hawkins should be reversed and remanded.

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[7] Judicial efficiency and convenience require, when possible, that this peripheral litigation be tried where the central antitrust case be tried. This factor favors the Southern District of Iowa.

Where The Claim of Cochrane Arose

The claim of appellant Cochrane is based primarily on service of abusive process, and secondarily on tortious interference with prospective advantage. All wrongful acts alleged by appellants are included in paragraph 15 of a one count complaint.

On the abuse of process claim of Cochrane it is clear that all process issued and served in the actions filed by defendants in the Northern District of Iowa and the Southern District of New York was served on appellant Cochrane in the District of Minnesota (Appellants' Brief 9).

It is claimed that the documents, the production of which was sought by the appellees, were in the Southern District of Iowa, and that the appellees sought to disqualify the appellants in the related basic antitrust action pending there.

For the same reasons given in the portion of this opinion concerning the district in which the claim of Hawkins arose, it is concluded that the claim of Cochrane, if cognizable under Minnesota law, arose in the District of Minnesota. All the five factors described by Mr. Justice Blackmun and noted in the *Gardner Engineering Corporation* case, *supra*, point to the District of Minnesota. Cochrane's convenience is accommodated by permitting him to litigate in the district in which he lives and practices. The principal acts and injury of which he complains occurred there. The location of the documents, and the complaints about the appellants in *MPIA v. Iowa Beef* are secondary.

Under the "weight of contacts" rules the most significant contacts and the most of the contacts occurred in the District of Minnesota.

For these reasons that portion of the judgment dismissing the complaint of Cochrane is affirmed without prejudice to his bringing an action in the District of Minnesota.

IV

The Claims of Appellants Are Not Compulsory Counterclaims

The appellees contend that the claims for relief of appellants are compulsory counterclaims that appellants were required to assert in the Northern District of Iowa under Rule 13(a) F.R.Civ.P. (Appellees' Brief IIA). We disagree for the reasons set out below.

Rule 13(a) in the material part provides as follows:

> "(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action. . . ."

This provision of Rule 13(a) is not applicable because (1) the claims of the appellants did not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim; (2) at the time the action below was lawfully commenced the claims of appellants were the subject of the action under review in the District Court of the Southern District of Iowa.

As an introduction to the discussion below some material dates and uncontroverted legal aspects of the litigation should be noted.

The actions of appellees in the Northern District of Iowa and in the Southern District of New York were each filed as a diversity action on or about June 7, 1977. The defendant Union was named as a defendant. A union for diversity purposes is a citizen of each state in which it had members.[8] Because the Union had members who were citizens of Nebraska, of which Iowa Beef was a citizen, neither of the actions in the Northern District of Iowa and in the Southern District of New York was lawfully commenced on June 7, 1977. Appellees in a brief filed in the district court on September 6, 1977, admitted the lack of diversity in those two actions (Appendix 65).

On July 22, 1977, appellants filed the action under review in the Southern District of Iowa as a diversity action. It was not until August 1, 1977, that appellees filed a complaint of which the District Court had jurisdiction in which the Union was dropped as a party. This was the date that the action in the Northern District of Iowa was lawfully commenced.

The transaction or occurrence that was the subject of the two actions in the Northern District of Iowa and in the Southern District of New York is described in appellees' brief as follows:

> The complaint alleged *inter alia* that Bagley, a former high ranking IBP officer, had breached both a settlement agreement with IBP which had been negotiated after Bagley's employment with IBP had been terminated and also his fiduciary duties to IBP by disclosing confidential IBP documents and information to Hawkins, Cochrane, Stern, Krieger and the Union. Aarsen, also a former IBP employee, was also charged with violating his fiduciary duties to IBP by wrongfully

[8] *United Steelworkers of America, AFL-CIO v. R.H. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965).

disclosing confidential IBP documents. The other defendants, including Hawkins and Cochrane, were charged with inducing Bagley's breaches of contract and violations of fiduciary duties and with conspiring to do those wrongful acts.

The Action of Appellants in the Southern District of Iowa Did Not Arise Out of the Transaction That Is the Subject Matter of Appellants' (sic) Claim in the Northern District of Iowa.

The gist of the action of appellants filed in the Southern District of Iowa was abuse of process and tortious interference with prospective advantage by a series of acts alleged in paragraph 15 of appellants' complaint. The central theme of appellants' complaint is abuse of legal process. In no substantial sense can appellants' claims for relief for abuse of process be found to have arisen out of the alleged breach of contract by Bagley and out of the alleged breach of fiduciary duties by Bagley and Aarsen.

This conclusion is supported by the scholarly opinion of Judge Julian in a similar case, *Bose Corporation v. Consumers Union of United States, Inc.*, (D. Mass. 1974) 384 F. Supp. 600. After a review of the applicable case law, and the various tests described in 6 Wright & Miller, *Federal Practice and Procedure* § 1410, Judge Julian concluded:

> The counterclaims can be read to allege malicious abuse of process. The analysis is similar to the analysis concerning defamation; *the counterclaims are permissive* and are barred unless operation of the statute of limitations was suspended. The counterclaims also can be read to assert a claim for malicious prosecution of a civil action. Such a claim

> is premature; the defendant must, and cannot, allege a favorable termination of this suit if it is to proceed on a theory of malicious prosecution. (Emphasis added.) 384 F.Supp. 1.c. 603.

The varying tests for determination whether the claim in question arose out of the same transaction or occurrence, within the meaning of Rule 13(a) are set forth in 6 Wright & Miller, *Federal Practice and Procedure* § 1410 at page 42 as follows:

> 1) Are the issues of fact and law raised by the claim and counterclaim largely the same?
>
> 2) Would res judicata bar a subsequent suit on defendant's claim absent the compulsory counterclaim rule?
>
> 3) Will substantially the same evidence support or refute plaintiff's claim as well as defendant's counterclaim?
>
> 4) Is there any logical relation between the claim and the counterclaim? (Footnotes omitted.)

Under these tests, as concluded by Judge Julian in the *Bose Corporation* case, *supra*, the claims for relief of appellants for abuse of process did not arise out of the transaction or occurrence described in appellees' complaints in the Northern District of Iowa.[9]

The reasoning of Judge Julian and the authorities cited are fully applicable to this case, in which the factual contrast between the claims of appellants and the transaction or occurrence of appellees' claim for relief are much clearer.

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[9] Even if it arose out of the same transaction or occurrence, a claim for relief that has not matured need not be asserted as a compulsory counterclaim. 6 Wright & Miller, *Federal Practice and Procedure*, § 1411, pages 54-55. It is not necessary to discuss this exception.

Appellees contend that representations made by appellants to the Judicial Panel on Multidistrict Litigation, in a motion to transfer the appellees' actions in the Southern District of New York and in the Northern District of Iowa to Judge Hanson in the Southern District of Iowa, establish that the three actions arise out of the same transaction and occurrence (Appendix 19-21). While paragraph 2 of the motion contains a legal conclusion lending some support to the construction of appelllees, paragraphs 4 and 5 clearly describe the difference in the claims noted above. Further, the full pleadings are before us for a determination from the primary evidence.

At the Time the Action of Appellees in the Northern District of Iowa Was Lawfully Commenced, Appellants' Action Was Pending in the Southern District of Iowa.

It was not until August 1, 1977, when the appellees filed an amended complaint in the Northern District of Iowa alleging diversity of citizenship, that the action of appellees was lawfully commenced. At that time the action of appellants was pending in the Southern District of Iowa on the basis of uncontroverted diversity of citizenship.

An action is not lawfully commenced within the meaning of Rule 13(a) when a complaint disclosing absence of jurisdiction on its face is filed. Appellees seek to avoid this conclusion by relying on the following provision of Rule 15(c):

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

The relation back rule is not applicable if the new claim did not arise out of the same transaction or occurrence. *Hale v. Ralston Purina Company,* (C.A. 8 1970) 432 F.2d 156. For the same reason it cannot affect the claim of appellants in a separate suit.

The purposes for which this provision of Rule 15(c), F.R.Civ.P., were intended do not include a procedural fiction applicable to changing the facts in civil actions competing for priority in filing under Rule 13(a) F.R.Civ.P.

The purposes of Rule 15(c) are discussed in detail in 3 *Moore's Federal Practice* ¶ 15.15. The relation back provision of Rule 15(c) is not applicable as contended by appellees.

For the foregoing reasons that portion of the judgment of the district court dismissing the claim for relief of appellant Hawkins is reversed and the cause remanded for further proceedings on the claim for relief of the appellant Hawkins. That portion of the judgment dismissing the claim for relief of appellant Cochrane for lack of venue is affirmed.

A true copy:
Attest:

CLERK, U.S. COURT OF APPEALS,
8th CIRCUIT.

UNITED STATES COURT OF APPEALS

For The Eight Circuit

September Term, 1978

77-1988 and 78-1008.

77-1988.
John A. Cochrane,

Appellant,

v.

Iowa Beef Processors, Inc., et al,

Appellees.

78-1008.
Lex Hawkins,

Appellant,

v.

Iowa Beef Processors, Inc., et al,

Appellees.

Appeals from the United States District Court for the Southern District of Iowa.

The Court having considered petition for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

All of the Judges who have voted on the petition for rehearing en banc have voted no with the exception of Judge Bright. Judge Lay has recused himself from voting.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

March 5, 1979

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 78-1008
John A. Cochrane,

Appellant,

v.

Iowa Beef Processors, Inc., Edward W. Rothe and Lee Freeman, Sr.,

Appellees.

No. 77-1988
Lex Hawkins,

Appellant,

v.

Iowa Beef Processors, Inc., Edward W. Rothe and Lee FREEMAN, Sr.,

Appellees.

Appeals from the United States District Court for the Southern District of Iowa.

DISSENT TO ORDER DENYING REHEARING EN BANC

BRIGHT, *Circuit Judge.*

I dissent from the denial of the petition for rehearing. I recognize that a decision of a panel of this court which does not dispose of the merits of a case is usually not a good candidate for *en banc* consideration. Nevertheless, it appears to me that the panel's opinion on the venue issue ought to be reconsidered.

I. *Factual Summary.*

On June 7, 1977, Iowa Beef Processors, Inc. (IBP), filed identical diversity actions against Hawkins,

Cochrane and others in the Northern District of Iowa and in the Southern District of New York, alleging, among other things, a conspiracy by Hawkins and Cochrane to defame IBP. IBP amended its complaints on August 1, 1977, dropping as a defendant a nonessential party whose presence arguably precluded diversity jurisdiction.[1]

On July 22, 1977, Hawkins and Cochrane (appellants) filed suit in the Southern District of Iowa against IBP and its counsel, Messrs. Rothe and Freeman (collectively, the appellees), alleging that the appellees had abused judicial process in IBP's Northern District of Iowa and New York lawsuits.[2]

On November 17, 1977, Chief Judge William C. Stuart (United States District Court for the Southern District of Iowa) granted the appellees' motion to dismiss the appellants' abuse of process actions in the Southern District of Iowa, holding that Hawkins' and Cochrane's claims arose in the Northern District of Iowa. The present appeal followed.

II. *The Venue Issue.*

Appellant Hawkins' abuse of process claim against the appellees is identical in substance to the claim of appellant Cochrane, and the disposition of each of those

[1] IBP voluntarily dismissed the New York action without prejudice on October 6, 1977.

[2] Specifically, the alleged abuse of process consisted of: (1) filing suit; (2) serving summons; and (3) serving a document request assertedly calling for Hawkins' and Cochrane's work product as counsel in *Meat Price Investigators Association* [MPIA] *v. Iowa Beef Processors, et al.*, an antitrust suit originally filed in the Southern District of Iowa on August 10, 1976, but transferred to the Northern District of Texas on June 7, 1977.

claims will require identical factual inquiries concerning the appellees' motivation in filing IBP's action, alleged to be abusive of process, in the Northern District of Iowa.[3] Moreover, it seems that the single forum which may most conveniently undertake such factual inquiries is the district in which the appellees filed their lawsuit, the Northern District of Iowa. Yet, according to the panel opinion, the substantially identical claims of Hawkins and Cochrane must be tried in two different forums: respectively, the Southern District of Iowa and the District of Minnesota.

That result is obviously impractical and potentially wasteful of judicial and legal time and resources, and I suggest that the panel's reasoning is unsound.[4]

[3] Under Iowa law, which the panel apparently assumes governs the merits of this action, *see* panel slip op. at 11-12, tortious abuse of process is defined as follows:

> Abuse of process, * * *, is the intentional use of legal process for an improper purpose incompatible with the lawful function of the process by one with an ulterior motive in doing so, * * *. The improper use which is the essence of the tort is ordinarily an attempt to secure from another some collateral advantage not properly includable in the process itself, and is, in Prosser's words, 'a form of extortion' in which a lawfully used process is perverted to an unlawful use. [*Sarvold v. Dodson*, 237 N.W.2d 447, 449 (Ia. 1976) (*quoting Hyde Construction Co. v. Koehring Co.*, 387 F. Supp. 702, 712-13 (S.D. Miss. 1974).]

[4] In ruling that Hawkins' claim arose in the Southern District of Iowa and that Cochrane's claim arose in the District of Minnesota, the panel opinion relies heavily upon *Gardner Engineering Corp. v. Page Engineering Co.*, 484 F.2d 27 (8th Cir. 1973) and the "factors [concerning the connection between a cause of action and a state] described by Mr. Justice Blackmun on page 31 of 484 F.2d * * *." Panel slip op. at 15. *See id.* at 17.

Such reliance is misplaced. Although the *Gardner Engineering* decision contains some discussion of a venue problem, 484 F.2d at 32-33, that discussion seems of little relevance here. In

(Footnote continued on following page)

The panel indicates that, if venue is proper in the districts where IBP filed its allegedly abusive lawsuits, Hawkins and Cochrane would need to bring abuse of process actions in New York as well as in the Northern District of Iowa, "further proliferating this growing mass of litigation." *Cochrane v. Iowa Beef Processors*, Nos. 77-1988, 77-1008, slip op. at 15 (8th Cir. Jan. 5, 1979). However, if venue is proper in the Northern District of Iowa, Hawkins and Cochrane could join, as pendent claims in their Northern District of Iowa action, any cause of action arising out of IBP's alleged abuse of the New York court's process. *See* Fed. R. Civ. P. 18(a). Surely, the convenience of the parties and the courts is best served by litigation of Iowa Beef's conspiracy action and of Hawkins' and Cochrane's peripheral abuse of process actions in a single forum, which can only be accomplished in the Northern District of Iowa. Instead, the panel itself has "proliferat[ed] this growing mass of litigation," by scattering these related actions to three separate forums.

I think the district court correctly determined that, for purposes of venue under 28 U.S.C. § 1391(a), the appellees' abuse of process claims "arose" in the Northern District of Iowa and that venue was properly in that district. In so ruling, the district court stated:

> In the present action, the Court finds the place of injury to be in the Northern District of Iowa. It is there, by filing an action against Hawkins and Cochrane, that defendants are alleged to be doing that which should not be done. While the injury

[4] *continued*
any event, the "factors" referred to and relied upon in the panel opinion bear upon whether a state has sufficient contacts with the subject of an action for *jurisdiction* to exist in that state, not upon whether *venue* was proper, the issue in this case.

> may have effects in this district [the Southern District of Iowa], the overt act giving rise to the injury was the filing of an action in the federal court for the Northern District of Iowa.
>
> To prove "abuse of process", plaintiffs must show that defendants seek to pervert the use of judicial process in the Northern District, and do so for an ulterior motive. *Sarvold v. Dodson*, 237 N.W.2d 447 (Iowa 1976). The Northern District Court is in a far better position to make such a determination. Though perhaps propelled by facts uncovered in an action elsewhere, defendants' action in the Northern District, based upon inducement to breach contract, is entirely different from the action allegedly interfered with in this Court, which focuses on antitrust violations. This Court should not attempt to tell the Northern District Court that a case pending on its docket was abusing its processes and was but a facade, much less—as plaintiffs request—enjoin the Northern District Court from processing that case. Also, if the Northern District proceeds on both actions, the possibility that rulings of this Court and the United States District Court for the Northern District would come into direct conflict is eliminated.

I agree with the district court's reasoning on this issue.

The effect of the panel decision is to place this court's imprimatur upon the obvious forum-shopping by attorneys Hawkins and Cochrane. A reconsideration and reversal of the panel opinion by the full court would demonstrate that such lawyers' tactics, which needlessly complicate the disposition of federal litigation, ought to receive short shrift.

Accordingly, I would grant the petition for rehearing, vacate the panel opinion, and affirm the district court.[5]

A true Copy:

Teste:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[5] In light of the nature of the abuse of process action under Iowa law, *see* note 1 *supra*, I agree with the panel's determination that the appellants' abuse of process claims did not arise from the same transaction as Iowa Beef Processors' action in the Northern District of Iowa, and were therefore not compulsory counterclaims in that action.

I am troubled, however, by the panel's alternative ruling on the compulsory counterclaim issue. The panel determined that the appellants' abuse of process actions were filed prior to the effective date of IBP's complaint in the Northern District of Iowa and therefore could not be compulsory counterclaims in IBP's action, under Fed. R. Civ. P. 13(a). *See* panel slip op. at 22-23. In so ruling, the panel concluded that, for purposes of Rule 13(a), IBP's amended complaint in the Northern District, altered to perfect diversity jurisdiction, does not relate back to the date of IBP's original complaint. Such a restrictive reading of the relation back rule of Fed. R. Civ. P. 15(c) lacks support in the language of the rule, in case law, or in policy. Although I have found no case considering this question in the context of Rule 13(a), prior decisions of this and other courts have indicated, without exception, that a complaint amended by dropping nonessential parties to perfect diversity jurisdiction relates back to the date of the original pleading. *E.g.*, *Finn v. American Fire & Casualty Co.*, 207 F.2d 113, 116 (5th Cir. 1953); *Brown v. Texas and Pacific R.R. Co.*, 392 F. Supp. 1120, 1124 (W.D. La. 1975). *See International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 121 F.2d 561, 563 (8th Cir. 1941) (dictum); 3A *Moore's Federal Practice* ¶ 21.03[2] (1978). *Cf. Interstate Refineries Co. v. Barry*, 7 F.2d 548, 550 (8th Cir. 1925) (in accord with relation back rule, but pre-Federal Rules).

APPENDIX B

HEARING BEFORE

JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: IOWA BEEF PROCESSORS EMPLOYMENT TERMINATION CONTRACT LITIGATION

Courtroom No. 1
Post Office & Courthouse
Boston, Massachusetts
September 30, 1977

Judge Weinfeld: We will not call the next case. It is No. 315, In re Iowa Beef Processors.

Mr. Greer: May it please the Court, my name is John Greer from Spencer, Iowa. I represent the two lawyers, Mr. Cochrane and Mr. Hawkins.

The position of the defendants is that Mr. Hawkins is an Iowa lawyer and Mr. Cochrane is a Minnesota lawyer. We were sued by Iowa Beef Processors in the Southern District of New York and in the Northern District of Iowa.

Mr. Cochrane and Mr. Hawkins brought the case against Iowa Beef Processors and Mr. Freeland (sic) and Mr. Roth (sic) in the Southern District of Iowa.

All of this arose out of other multidistrict litigation, as the Panel is well aware, or at least an incident that was related to it.

Judge Hanson referred a motion brought by one of the defendants in the wheat (sic) price fixing cases—Spencer Foods. In that case Beef Processors was not a mover.

Before that matter was decided by Judge Hanson they brought this action against these lawyers.

Professionally, I must state, that the lawyers have had nothing to do with New York in any sense of the word.

Judge Weinfeld: You mean the two lawyers you represent?

Mr. Greer: Yes, sir.

Judge Weinfeld: There is an indication that the New York action was brought really to make sure that an action was pending in one court or the other—Iowa or New York.

Mr. Greer: I realize that is what the brief says, your Honor, but we were obliged to employ counsel and defend ourselves in the Southern District of New York, and it is still pending, and it is germane to our case here.

No matter the representation that is made by the defendants, I don't think that we have had at any time any business in New York, but they chose to do that.

Judge Weinfeld: Well, Mr. Krieger is a defendant in that case, is he not, and he practices law in New York, although he claims he is no longer domiciled there.

Mr. Greer: That is true, your Honor. I have just met him during some discovery at Sioux City. I understand he is a New York lawyer who lives in Miami and I don't believe that he takes a position that is contrary to ours.

Judge Weinfeld: Well, assume the cases should be consolidated or transferred. Why do you prefer one district over the other? I have a little difficulty in following the arguments made in the briefs. How far is Sioux City? Is that where you want the action to remain?

Mr. Greer: I would prefer that it be Des Moines.

Judge Weinfeld: Why do you want Des Moines instead of Sioux City? What is the difference in mileage? I had great difficulty in following the arguments.

Judge Harper: There is a terrific difference in the status of the two districts, as far as being current is concerned. Des Moines is bogged down very, very badly. They did seek, and the Conference recommended, an additional judge. The other one is current, except with respect to Judge Hanson, who carries part of the docket. Isn't that correct?

Mr. Greer: I think that is correct, your Honor.

Simply stated, Judge, the two men who are individual defendants, a man named Aarsen and another named Bagley, they were former employees of Iowa Beef Processors. They are now employed by Spencer Foods. We have a direct flight at 6:30 in the morning to Des Moines. We don't have any way of getting to Sioux City, short of driving, and, although Sioux City is a shorter distance, it presents a much greater problem for attendance at the preliminary matters.

Judge Wisdom: You mean there is no airport in Sioux City?

Mr. Greer: There is an airport but no way to fly from Spencer to Sioux City, your Honor.

Judge Weinfeld: What is the mileage?

Mr. Greer: About a hundred miles there and about a hundred and 30 miles by air to Des Moines—165 by car—but, for 15 years Judge Hanson, who lives at Jefferson, which is between Des Moines and Sioux City, has handled matters in the Southern District, as well as matters in the Northern District. Judge Hanson has retired. He is on senior status.

Judge Harper: When did that occur?

Mr. Greer: August 15, your Honor.

Judge McManus sits at Cedar Rapids, Iowa, and they are having new district attorney appointments in the Northern District, and he anticipates a concentration of work at Cedar Rapids, at least that is what I have been told.

It makes no difference to us which judge handles this case—absolutely no difference. I am satisfied

with all of our Federal Judges in Iowa and have been all my life.

The convenience of the parties would indicate that Judge Hanson could manage these matters, because he is more familar with them, and, primarily, we are going to be engaged in discovery—

Judge Wisdom: Well, your adversary suggests the reason you want it before Judge Hanson is because you got a favorable decision on a motion made with respect to the attorneys, which is in the papers. I believe that is where I got it from.

Mr. Greer: They have appealed Judge Hanson's order, but I don't think that they have made any motion with respect to—

Judge Weinfeld: Is that an appealable order?

Mr. Greer: I don't think so, your Honor.

Judge Weinfeld: That was made under the local rules in Iowa, wasn't it?

Mr. Greer: Yes, your Honor.

Judge Harper: I really don't know what you are talking about. In other words, he is retired and they have one other judge there, who is now the senior judge, and they are going to get another one. Judge Hanson was a traveling judge, carrying half the docket in each place. In other words, you could get him in either spot, couldn't you?

Mr. Greer: That is exactly what I am saying. It will be more convenient, especially for the people who don't have money—

Judge Weinfeld: Who doesn't have money in this case?

Mr. Greer: Not the people I represent, you Honor, but the two individual employees.

For instance, in one day of the deposition where I am deposing the general counsel of IBP there are 82 objections, all which require rulings by a court.

Judge Harper: 82 objections to what?

Mr. Greer: Based on privilege.

Judge Harper: You mean Interrogatories or what?

Judge Weinfeld: It is evident, Mr. Greer, this is a donnybrook and it is a case of crimination and recrimination charges and countercharges, and carrying with it the usual bitterness—that type of litigation—and so it doesn't surprise me that almost every question that is put to a witness would draw an objection. I think this is the nature of the litigation you are in. I think that is a realistic statement of what this case is about.

Judge Wisdom: Mr. Greer, you have exceeded your time by double.

Mr. Greer: I am sorry.

Judge Wisdom: We will still give you a couple of minutes for rebuttal.

Mr. Greer: I am sorry.

Judge Wisdom: I hope it won't take you twice as long as Mr. Greer, Mr. Rothe, to state your case.

Mr. Rothe: I think I can be shorter than the 20 minutes I asked for.

My name is Edward Rothe. I am from Chicago. I represent Iowa Beef Processors, the plaintiffs in both the New York and the Sioux City cases, and a defendant in the Des Moines case. I also speak for myself and my partner, who are defendants in the Des Moines case, alleging abuse of process and bringing the New York and Sioux City cases.

Judge Weinfeld: Do you think you ought to represent yourself as a defendant?

Mr. Rothe: So far, your Honor.

Judge Weinfeld: I think what I said a moment ago, in all seriousness, is the truth. This is a donnybrook in a case of charges and countercharges about everything.

Mr. Rothe: I fear that is true, your Honor. I could not otherwise characterize it myself.

I would like to say that I am one of the defendants who doesn't have money in the case, in response to an earlier question, and the two other defendants who were identified as not having money, the two former IBP employees, Aarsen and Bagley, Mr. Greer referred to the fact it would be

more conveniently situated in Des Moines than Sioux City. Both of those people reside in the Northern District of Iowa and both have asked this Panel that it not be transferred to Des Monies, but, rather, retained in Sioux City.

I should also like to comment on the convenience of the matter to counsel. All of the parties have retained counsel in Sioux City, or in the Northern District, including Hawkins, and Mr. Greer himself is from Spencer, in the Northern District.

With respect to the convenience of flying, I understood, at least during the depositions we took in Sioux City by agreement in all of the cases, that Mr. Greer has at his disposal a private plane. He flew from Spencer to Sioux City and I can't imagine that was very inconvenient for him.

The individual defendant Bagley lives in Sioux City.

Judge Weinfeld: Is Bagley the one that gave the convenant which started the suit, this series of suits?

Mr. Rothe: That is correct. He lives in Sioux City. The covenant was executed in Sioux City.

It seems to me that nothing points to Des Moines except the desire of Mr. Hawkins, who does reside in Des Moines and practices there, to have the case there. None of the other parties has really requested that the case go to Des Moines. The union people who have been sued as class representatives are out of Chicago. They have said they don't care, just so long as it is an Iowa district. Krieger, who is a New York lawyer, as you know, Judge Weinfeld, has said he doesn't care where it is tried, but does not request Des Moines specifically.

We urge Sioux City because, otherwise, the tail would wag the dog.

I would like to bring up a little bit on the events to date. I had volunteered in our original submission to the Panel that there were ways to eliminate the complexity of this litigation, one of which would be for the defendants in either New York or Sioux

City to waive any possible venue and jurisdiction problems personally. Just yesterday I was notified that Stern, who is the union man in New York, and might have a venue objection for Iowa—Sioux City—has said that he will waive venue and personal jurisdiction objections.

His Pleading in Iowa has not been filed. It is overdue.

Judge Weinfeld: Where does he suggest it should go? Sioux City?

Mr. Rothe: He doesn't take a position. He did not file a response to the motion.

Now, since he has waived or says he will when he files his Answer, which he has not yet done because he is asking for extensions, due to the pendency of the matter before the Judicial Panel, I have been urging: Let's find out whether you are going to claim venue or personal jurisdiction problems, and I feel that maybe we can resolve this. I think maybe we have, since he has said he will waive venue and personal jurisdiction in Sioux City, and since the other defendants have filed Motions to Dismiss for lack of diversity jurisdiction in Sioux City, without coupling with them either venue or personal jurisdiction objections—I take it those have been waived—and, therefore, I think we are in a position to dismiss the New York action without prejudice and allow the Sioux City action to continue. There are motions on file in both Des Moines and Sioux City which would force the Des Moines action to be a compulsory counterclaim to the Sioux City action, and so what have been three will be one, I think.

Judge Weinfeld: How do you get to Sioux City from Chicago? Is one place as convenient to you as the other?

Mr. Rothe: It really is. There are many, many flights to Sioux City. My client is across the river from Sioux City, so I am always there.

I think the practical answer is that the case doesn't really need to be before the Judicial Panel. I

think that, by the consent to the venue in Iowa, it will enable me—

Judge Weinfeld: You say that Stern has indicated waiver of venue, but there is nothing before the Panel to indicate that.

Mr. Rothe: I only got the letter yesterday. I offered both in my submission here and I would say orally that if the defendants could get together and decide where they wanted the case, fine, we'd dismiss one or the other.

All of the other defendants said that we could consent to venue in Iowa, except Stern, and all have filed a motion which, I take it, would be a consent to venue in personal jurisdiction there, except Stern, whose Answer was due on September 26th to the Complaint, but, as far as I know, nothing has been filed, at least I haven't been served. I do have the letter, however, that says that. I do know that there is nothing before the Panel, however, on this. That is true.

Judge Wisdom: Mr. Greer, you have a couple of minutes.

Mr. Greer: Mr. Bagley still has a home in Sioux City, but he is employed at Spencer and is at Spencer every day.

Judge Weinfeld: How far is Spencer from Sioux City and how far is it from Des Moines?

Mr. Greer: About 100 miles, you Honor from Sioux City to Spencer and about 160 miles from Sioux City to Des Moines, but the distance is really not our real problem. It is the management of the discovery. That is our real problem.

I think that either judge will be satisfactory, as I have previously said. Judge Hanson will be in the position to give us that time.

Judge Harper: Judge Hanson is in the most fortunate position where he doesn't have to give anybody any time, if he doesn't want to, that is, if he is retired, as you say.

Mr. Greer: Right, your Honor.

If it is possible, I would suggest that someone representing the Panel talk with both judges before this decision is made, because we do have some particular problems in Iowa, not just the amount of documents.

Judge Weinfeld: Your adversary suggests the possibility that if the Panel didn't act that the matter be resolved in terms of dismissal or agreement. What is your view about that?

Judge Weigel: Dismissal of one suit someplace.

Judge Weinfeld: Do you mind if I ask Mr. Rothe a very direct question?

I got the impression that somehow you did not want the case transferred to a district where Judge Hanson would preside over the case. Am I wrong about that? Was that because he decided the motion made with respect to disqualification of the lawyers?

Mr. Rothe: I would say there are two reasons. That is part of it, your Honor.

Judge Harper: Can I get into this: Judge Hanson is in both of them. It doesn't make any difference where it goes. He is the one that it will go to. They don't get away from him in either court.

Mr. Rothe: Except the judge to whom it is assigned now is Judge McManus.

Judge Harper: I understand, but Judge Hanson, as a roving Judge in both of those areas, carries part of the Cedar Rapids, as well as part of the Des Moines docket.

Judge Weinfeld: It doesn't follow it would be assigned to him.

Mr. Rothe: Well, yes, of course, I have read Judge Hanson's decision in the ethical violation motion made by Spencer which, incidentally, is not being appealed by us, as you may have gathered from Mr. Greer. It is being appealed by Spencer to the Eighth Circuit.

We had a similar motion pending, which is now deferred, by Judge Hanson and, therefore, is before Judge Taylor, as a result of the transfer of the beef

litigation to Dallas. So we have a motion that is pending and is in limbo right now.

The other reason, aside from Judge Hanson's early expression of reluctance to get into the ethical problems that we think we are going to be raised in the case, another thing is the fact that I don't think that a lawyer ought to be able to violate the compulsory counterclaim rule, Rule 13(a), file a malicious prosecution action for our having brought the Sioux City case in another forum, I suggest to you ostensively to obtain the venue of Judge Hanson, who ruled favorably, and then use that as a device to leverage transfer by this Panel. I think there are considerations as to what this Panel is for and who ought to invoke its process and how that enters into this question of whether it goes to Judge Hanson or not.

I would not move to recuse Judge Hanson at all. He is a fine judge.

Judge Weinfeld: If the New York action is eliminated, there are only two actions pending.

Mr. Rothe: That is correct, and there are motions pending in both courts to consolidate those because of the compulsory counterclaim nature of the malicious prosecution action.

Judge Weinfeld: If there are two actions pending, why wouldn't it be appropriate for the lawyers to move, under 1404(a) for a transfer and let the Court there decide it?

Incidentally, I am informed that Mr. Cammer, who represents Stern, is here. He has not asked for permission to speak, but he did write a letter and said that he was consenting.

Are you prepared to make a statement on the record that you will waive the venue and jurisdiction?

Mr. Cammer: We have done it by letter.

Judge Weinfeld: That leaves just two actions.

Mr. Rothe: I think so, and the mechanics for getting them together through the compulsory counterclaim motion is pending.

(Bench conference off the record.)

Judge Weinfeld: We have had a little bench conference and we have decided, since there are only two actions, we will just leave them where they are.

Thank you very much, gentlemen. Have a good trip back.

(Whereupon, the hearing was adjourned.)

DOCKET NO. 315

Before the Judicial Panel on Multidistrict Litigation
In re Iowa Beef Processors Employment Termination Contract Litigation.

ORDER DENYING TRANSFER

(Filed in U.S. District Court October 7, 1977)

The Panel ruled from the bench at the hearing on this matter that the three actions involved in this litigation do not share unusally complex questions of fact and that transfer of these actions to a single district pursuant to 28 U.S.C. § 1407 for coordinated or consolidated pretrial proceedings would not necessarily serve the convenience of the parties and witnesses or promote the just and efficient conduct of the actions.[1]

It Is Therefore Ordered that transfer pursuant to Section 1407 of the actions listed on the attached Schedule A be, and the same hereby is, Denied.

For the Panel:

JOHN MINOR WISDOM
Chairman

[1] **See In re Scotch Whiskey**, 299 F. Supp. 543, 544 (J.P.M.L. 1969).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

IOWA BEEF PROCESSORS, INC.,

Plaintiff,

v.

PATRICK E. GORMAN, HARRY R. POOLE, and SAM TALARICO, as representatives of the members of AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO; IRVING STERN; ALBERT J. KRIEGER; LEX HAWKINS; JOHN A. COCHRANE; HUGHES A. BAGLEY; and HANS AARSEN,

Defendants.

No. C 77-4040

ORDER

(Filed Feb 13 1978)

The matter before the court is the latest imbroglio of the parties.[1] Pending motions are:

(1) Defendant John A. Cochrane's resisted motions to dismiss and for a protective order, both filed July 22, 1977. Denied.

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[1] The court has examined the transcript of the hearing before the Judicial Panel on Multidistrict Litigation (September 30, 1977) wherein Judge Weinfeld described this litigation as "a donnybrook . . . [and] a case of crimination and recrimination charges and counter-charges, and carrying with it the usual bitterness . . . [where] almost every question that is put to a witness would draw an objection". The record to date appears to support this assessment.

(2) Defendant Lex Hawkins' resisted motions to dismiss and for a protective order, both filed July 22, 1977. Denied.

(3) Defendant Albert J. Krieger's resisted motion to dismiss filed August 15, 1977. Denied.

(4) Plaintiff's resisted motion to enjoin a separate action filed in the United States Court for the Southern District of Iowa filed August 15, 1977. Denied.

(5) Defendants Hawkins and Cochrane's resisted motions to dismiss and for a protective order, both filed August 30, 1977. Denied.

(6) Defendants Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (Union), Patrick E. Gorman, Harry R. Poole, and Sam Talarico's resisted motion to dismiss filed September 6, 1977. Denied.

(7) Plaintiff's resisted motion to compel production of documents filed September 8, 1977. Granted.

(8) Defendant Irving Stern's resisted motion to dismiss filed September 26, 1977. Denied.

(9) Plaintiff's resisted motions for summary judgment, for a protective order and to compel discovery, all filed October 28, 1977. Granted and denied in part.

(10) Defendants Hawkins and Cochrane's resisted motion to compel answers to deposition questions filed December 13, 1977. Granted and denied in part.

In this diversity action plaintiff seeks damages and injunctive relief against defendants for their role in the alleged malicious inducement to breach and breach of a settlement agreement between plaintiff and defendant Hughes A. Bagley [Bagley], plaintiff's former Vice-President.[2] Plaintiff claims that Bagley met with the de-

[2] The settlement agreement, summarized, compromised Bagley's compensation claims under his employment contract

(Footnote continued on following page)

fendants several times and provided copies of plaintiff's documents, secured with the help of defendant Aarsen, to the defendant attorneys for the purpose of aiding anti-trust litigation pending against plaintiff in Texas, (M.D.L. No. 248). Plaintiff alleges that the conduct by Bagley violates both the terms of his settlement agreement and his fiduciary duty to the company and that it was knowingly and maliciously induced by various defendants who conspired to use the inside information to cause damage to IBP's business.

Motion to Dismiss for Lack of Subject Matter Jurisdiction

Plaintiff originally brought this suit against *inter alia* the Union as an entity. Defendants Hawkins and Cochrane originally sought to dismiss for lack of

[2] *continued*
and released IBP from latent suits by Bagley in return for a release of Bagley from a covenant not to compete contained in his employment contract and a release of any cause of action IBP may have had to the time of the settlement agreement.

Paragraph 3.2 of the covenant bound Bagley to refrain from assisting third-party litigation against IBP, stating:

> 3.2 BAGLEY, for himself and heirs, legal representatives and assigns, covenants with IBP to forever refrain from aiding, abetting or in any way assisting any third person not a party to this agreement in the bringing of any action or the prosecution of any claim or demand of whatever kind or nature against IBP for any matter, fact, circumstances, happening or thing whatsoever occurring or failing to occur from the beginning of the world to the day of the date of these presents. BAGLEY hereby agrees that any breach of this covenant by him would not be adequately compensable in damages and agrees that, in the event of any breach by him of said covenant, IBP shall, in addition to any claim for damages for breach of covenant to which it may be entitled, be authorized and entitled to seek and obtain equitable relief by way of injunction or otherwise in a court of competent jurisdiction.

diversity averring that the Union had many members of Nebraska citizenship, the citizenship of plaintiff. Plaintiff then amended its complaint to drop Amalgamated and add its three top officers as representatives of the union and its members. The purpose of the amendment as stated in plaintiff's brief was to "utilize . . . the procedure provided in Rule 23.2 of the Federal Rules of Civil Procedure added in 1966 to avoid the absurdities created by the ancient doctrine that a labor union takes the citizenship of its members. . . ."[3]

Defendants Hawkins, Cochrane, Stern, Gorman, Poole and Talarico moved to dismiss, again on the basis of lack of subject matter jurisdiction. Defendants contend that Rule 23.2 FRCP is not a class action rule and that the citizenship of all union members is still the relevant determinant of diversity.

The question here is whether Rule 23.2 establishes a class action with respect to unincorporated organizations thereby making the citizenship of the representatives of the class, together with the citizenship of plaintiff, solely determinant of diversity. If the rule is a class action rule, jurisdiction is established since plaintiff and the representative parties are of diverse citizenship. If the rule is not a class action rule the court lacks jurisdiction since it is undisputed that some members of the Union are of the same citizenship as plaintiff.

The rule states:

> An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

[3] IBP's Opposition to the Hawkins and Cochrane Motion to Dismiss, filed August 1, 1977, at 5.

Wright & Miller and Moore agree that this rule provides a mechanism for class action treatment of unincorporated associations.[4] It is argued, however, that some courts have disagreed and held that the rule is merely a capacity-to-sue-or-be-sued provision to give entity treatment to an association.[5] The Advisory Committee's Note to Rule 23.2 lends support to this latter interpretation.[6]

[4] *See* 7A Wright & Miller, Federal Practice and Procedure: Civil § 1861 (1972); 3B Moore, Federal Practice, ¶ 23.2.02 (2d ed. 1977).

[5] *See Lee v. Navarro Savings Ass'n*, 416 F.Supp. 1186, 1190 (N.D. Texas 1976); *Suchem, Inc. v. Central Aguirre Sugar Co.*, 52 FRD 348, 351 (D. Puerto Rico 1971). *Lee* and *Suchem* are distinguishable, however, because neither court found that unincorporated associations did have entity status in Texas and Puerto Rico and therefore Rule 23.2 was not available. The Iowa rule, applicable by operation of Rule 17(b) FRCP, holds that unincorporated associations *do not* have entity status and cannot sue or be sued directly in the absence of waiver or estoppel. *See Boyer v. Iowa High School Athletic Ass'n*, 138 NW2d 914, 915 (Iowa 1965). The language of *Wilson & Co. v. United Packinghouse Wkrs. of America*, 181 F.Supp. 809, at 817 (N.D. Ia. 1960) and *Coughlon v. Iowa High School Athletic Ass'n*, 150 NW2d 660, at 662 (Iowa 1967) put in context here, is not otherwise. Finding that Rule 23.2 is available, the issue before the court here was never addressed by *Lee* nor was it properly before the court in *Suchem*.

[6] The Advisory Committee's Note states:

> Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action the real or main purpose of this characterization has been to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b)

39 FRD 108 (1966).

An examination of the rule itself and the writings of the commentators leads this court to conclude that Rule 23.2 FRCP is a class action provision and that plaintiff may assert its claim against the union as a class. The rule itself incorporates by express reference portions of Rule 23 FRCP.[7] The requirements of numerosity, commonality and typicality contained in Rule 23 may be subsumed implicitly into Rule 23.2[8] In any event they are present here. This is in fact a bona fide unincorporated association and there is no suggestion that Rule 23.2 was utilized to evade the constraints on the court's jurisdiction.[9] *See* 7A Wright & Miller, Federal Practice and Procedure: Civil § 1861, at 461 (1972). Accordingly, this action is maintainable as a class action; the citizenship of the representative defendants and plaintiff are diverse; motion to dismiss for lack of subject matter jurisdiction denied. *See generally Patrician Towers Owners, Inc. v. Fairchild*, 513 F.2d 216, 220 (4th Cir. 1975); *Management Television Systems, Inc. v. National Football League*, supra.

[7] Defendants point out that the provisions for notice and pleading present in Rule 23 are absent from Rule 23.2. This absence may be explained by the fact that the problems of defining the class and giving notice to the class that plague Rule 23 class actions are minimized in the context of an unincorporated association where the class is fairly defined and notice easily obtained.

[8] *See Merkey v. Board of Regents of State of Florida*, 344 F.Supp. 1296, 1303 (N.D. Fla. 1972) *vacated on other grounds* 493 F.2d 790 (5th Cir. 1973). *But see Management Television Systems, Inc. v. National Football League*, 52 FRD 162, 164 (E.D. Pa. 1971). 7A Wright & Miller, *supra;* 3B Moore, *supra.*

[9] As defendants point out in Reply Brief filed October 7, 1977, at 8:

> It is well-settled that . . . [diversity] jurisdiction is available . . . in a traditional class action under Rule 23 where only the citizenship of class representatives is considered in determining whether diversity exists. *See Montgomery Ward & Co. v. Longer*, 168 F.2d 182 (8th Cir. 1948).

Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted

Defendants Hawkins, Cochrane, Krieger and Stern next move to dismiss for failure to state a claim for which relief can be granted. All complain of a lack of specificity and factual allegations—in the case of defendants Cochrane and Hawkins, as to the allegations in the complaint of breach of fiduciary duty and conspiracy; in the case of defendant Krieger, as to the allegations in the complaint of inducing breach of contract; in the case of defendant Stern, as to all of the above.

The standard for a motion to dismiss is that such a motion cannot be granted unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Cruz v. Beto*, 405 U.S. 319, 322 (1972). In this light defendants' motions fail and are denied.

Motion to Enjoin Prosecution of Separate Action in Lieu of Compulsory Counterclaim

Plaintiff sought, by this motion, to prevent defendants Hawkins and Cochrane from pursuing an abuse of process action in the United States District Court for the Southern District of Iowa. However, since that action was dismissed by Judge Stuart on November 17, 1977, this motion is denied as moot.

Motions for Protective Order and Motions to Compel

A number of motions for protective orders and corresponding motions to compel have been filed in this action. In some instances the granting of one motion requires the denial of another. In each of these instances that result will be indicated.

The first motions for protective orders were filed by defendants Cochrane and Hawkins on July 22, 1977. They were unaccompanied by an affidavit of good faith attempts at resolution by alternate means and the movants were notified that no further action would be taken until Rule 16E of the Local Rules was complied with. Cochrane and Hawkins filed essentially the same motion for protective order, with affidavit, on August 30, 1977. The substance of the motion sought protection for documents subject to discovery requests in the antitrust suit M.D.L. No. 248 until such time as the documents are discoverable there. The motion also sought to protect documents alleged to be protected by the attorney-client privilege and work-product immunity. Finally, incorporating by reference a response to a request for production of documents, the defendants refused to produce requested documents so long as their motions to dismiss remained outstanding. Plaintiff's response was to move to compel production of those documents contained in its first request.

The overriding rationale applied with respect to all discovery motions is that discovery provisions are to be broadly and liberally construed. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947); *accord Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964). Taking defendants' last claim first, it is clear that this matter has been resolved by the court's ruling today. As to the claim that the documents are protected by work-product immunity and attorney-client privilege the court concludes that a blanket invocation of these doctrines to bar discovery is inappropriate. In this case, where state law supplies the rule of decision, Rule 501 FREv, the burden of establishing attorney-client privilege is on the defendants. *Bailey v. Chicago, Burlington & Quincy Railroad Co.*, 179 NW2d 560, 564 (Iowa 1970). That burden cannot be met by

resort to a privilege incantation. The assertion must be document-specific with a sufficient articulation of the underlying circumstances and general substance, and identification of the parties involved, to establish a prima facie showing of privilege. This standard applies to the assertion of work-product immunity as well. In this instance defendants have not borne this burden.

The claim that defendants are protected from discovery requests pending in MDL No. 248 until the documents are allowed to be discovered in that action cannot be accepted. The effect of an assent to this idea would subordinate this action and ancillary discovery matters to another case filed in another district court. Discovery here cannot be predicated on what that court will do. However, this does not mean that the court is insensitive to the potential for interference with the conduct of orderly discovery in MDL No. 248. All parties have indicated that a voluminous amount of materials are subject to requests for discovery here. Bearing this in mind, together with the potential for interference with MDL No. 248, the court orders defendants Hawkins and Cochrane to comply with plaintiff's first request for production of documents[10] by producing the documents in the usual manner or by affording plaintiff a reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries at the place where the records are kept or at any other mutually agreed-upon place. *Cf.* Rule 33(c) FRCP. In the event discovery of the materials in this fashion results in undue interference with MDL No. 248 suitable protection may be obtained from this court on a *particularized* showing.

[10] The court notes that defendants maintain that they have no documents falling within Specification No. 6 of plaintiff's first request for production of documents. On this representation defendants need not comply.

Plaintiff moved for a protective order on October 28, 1977, prohibiting defendants' inquiry into matters allegedly protected by attorney-client privilege, prohibiting inquiry into purported illegal acts by plaintiff, and restricting use of IBP business information to defense counsel for purposes of this case and to Cochrane and Hawkins for the purposes of MDL No. 248. The court grants the protective order limiting the usage of IBP's confidential business information and denies the motion regarding the claim of attorney-client privilege and the claim of the irrelevance of illegal acts.

Plaintiff falls prey to the same lack of specificity that defendants Hawkins and Cochrane do regarding a claim of attorney-client privilege. A mere recitation of the privilege litany is insufficient. The standards applicable to meeting the burden of establishing a privilege set out above apply here. Plaintiff cannot meet that burden by requesting protection from inquiry into "matters protected by IBP's attorney-client privilege".

The court also rejects the claim that illegal acts by IBP are irrelevant to the case. The claim that the covenant between IBP and Bagley was intended to conceal illegal acts is central to defendants' case. A relevance objection is unavailing in this context.[11]

Defendants Cochrane and Hawkins filed a motion to compel answers to questions propounded during an oral deposition of William L. Heubaum, corporate counsel for IBP. The court has examined the questions and the context in which they were asked. It seems apparent that

[11] Plaintiff would have the court determine in the guise of a protective order, in addition to its motion for summary judgment discussed *infra*, that the Bagley covenant does not offend public policy. The court is not willing to make that determination at this stage of the litigation.

work-product immunity or the attorney-client privilege is applicable to the information sought.[12] Defendants, however, seek to overcome the immunity or privilege by invoking the improper purpose exception.[13] Defendants' burden in this respect is heavy—they must make a *prima facie* showing that the information sought was transmitted in furtherance of a crime or tort. *Pfizer, Inc. v. Lord*, 456 F.2d 545, 549 (8th Cir. 1972). *See In re Murphy*, 560 F.2d 326, 338 (8th Cir. 1977). Defendants assert that "[t]he testimony in the present case . . . establishes conclusively the existence of antitrust violations by IBP". This assertion is exaggerated. In any event defendants must make a *prima facie* showing that the communication was pursuant to the crime or tort. *See In re Murphy, supra.* No such showing has been made. Except as noted herein, the motion to compel answers is denied.

Plaintiff moved to compel defendant Bagley to answer deposition questions which he has refused to answer on grounds of attorney-client privilege. An examination of the questions reveals that the information sought would

[12] This is *not true* as to all information sought. For example, counsel for IBP claimed attorney-client privilege as to the *number* and *bulk* of file drawers regarding antitrust at Heubaum's office (Heubaum deposition, Volume I at 146-147) and as to *whether* certain documents, often times the contents of which were disclosed, were sent to IBP's attorneys (Heubaum deposition, Volume I at 155, 210-213). This information is clearly not privileged.

[13] Defendants also invoke the general rule that privilege does not lie when business, as opposed to legal, counsel is sought. Though it may be true that a corporation cannot merely utilize general counsel as a conduit to protect all its documents and other information it is also true that defendants have not shown in even the slightest degree that this activity has occurred here. Merely noting that Heubaum serves Iowa Beef as Secretary and Vice-President as well as general counsel is insufficient.

be privileged. Plaintiff maintains, however, that the privilege was waived by Bagley's answer, paragraph 10, which allegedly injects a state-of-mind issue into the case. That paragraph states in part:

> It is affirmatively alleged that paragraph 3.2 of the Settlement Agreement was obtained by fraud and misrepresentation on the part of IBP.

Since this response does inject the question of reliance on IBP's statements or acts[14] Bagley cannot now prevent inquiry directed to that issue. This information is vital to plaintiff to meet Bagley's affirmative defense of fraud and misrepresentation. *See Haymes v. Smith*, 73 FRD 572, 577 (W.D.N.Y. 1976); *Hearn v. Rhay*, 68 FRD 574, 581 (E.D. Wash. 1975). Defendant Bagley is directed to answer questions relevant to the question of reliance; the attorney-client privilege is waived.

Motion for Summary Judgment

IBP moves for summary judgment against Bagley on the question of liability for breach of the settlement agreement with IBP and for violation of the fiduciary duty allegedly owed by IBP.

IBP has a particularly heavy burden of persuasion—the movant must show that there is no genuine issue of any material fact and that it is entitled to judgment as a matter of law. Rule 56(c) FRCP; *see Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). The court is required to view the facts in the light most favorable to the party opposing the motion and to give to that party the benefit of all reasonable inferences to be drawn from the facts. *Adickes v. S.H. Kress & Co.*, 398

[14] See 37 Am. Jur. 2d, Fraud and Deceit § 223 *et seq; cf.* W. Prosser, Torts, 714 *et seq* (4th ed. 1971).

U.S. 144, 158-59 (1970). The court cannot say, at this point in the litigation, that there is no genuine issue of material fact. Furthermore, though IBP attempts to de-emphasize the importance of the motion by carefully limiting it to Bagley, the preclusive effect of the ruling, if only from a reasoning standpoint, is apparent. The court considers it inappropriate at this time to resolve this issue and therefore a major portion of the lawsuit. Further discovery and a vigorous analysis of the relevant legal principles might make summary judgment feasible in the future.

It is Therefore
ORDERED

1. Motions 1-6 inclusive and 8 above are denied.
2. Motion 7 is granted.
3. Motions 9 and 10 granted and denied in part.

February 10, 1978.

EDWARD J. MCMANUS, *Chief Judge*
United States District Court